Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BMC INDUSTRIES, INC.,

Petitioner,

v.

BARTH INDUSTRIES, INC., Nesco, Inc., f/k/a Nesco Management, Inc., Barth Industries Co. Limited Partnership, BIC Corporation, Nesco Holdings, Inc., f/k/a Nesco, Inc.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In rendering a decision directly in conflict with the seminal decision of the Seventh Circuit on a key provision of uniform commercial law, should the Eleventh Circuit have certified the dispositive issue involving that key provision to the Florida Supreme Court rather than imposing its own unprecedented view on Florida?

LIST OF PARTIES AND CORPORATE AFFILIATIONS

There are no additional parties in this proceeding.

Petitioner has no parent company and its only nonwholly owned subsidiary is P.T. Vision-Ease Asia. Barth Industries, Inc. is a wholly owned subsidiary of Nesco Holdings, Inc. and trial resulted in a split verdict against Barth and Nesco. However, the reversed judgment on the verdict entered against Nesco on the theory of promissory estoppel is not in issue. Only the contract liability against Barth under Article 2 is presented for review.

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BMC Industries, Inc. petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 160 F.3d 1322 (1998). The opinion of the trial court determining that the Uniform Commercial Code does not apply to the transaction (App. B) is unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered its decision on November 18, 1998, at which time the judgment of that court was entered. (App. A). Petitioner timely served its petition for rehearing and suggestion for rehearing *en banc* and for certification on December 9, 1998, which the court denied on December 30, 1998. (App. E). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1), which permits review of decisions that conflict with decisions of the circuit courts on the same matter, and § 2101(c). *See* Rules of the Supreme Court 10(a) and (c).

STATUTES, CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. Since this case primarily involves a section of a uniform act adopted by Florida, both the uniform act provision and the wording of the provision adopted by Florida are set forth below. Excepting the italicized words and numbers, the two sections are identical.

(a) U.C.C. 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this *Article* needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this *Article (Section 2-201)* must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

(b) *Florida Statutes* § 672.209. Modification, Rescission and Waiver

(1) An agreement modifying a contract within this *chapter* needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this *chapter (s. 672.201)* must be satisfied if the contract as modified is within its provision.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

2. This case also involves the jurisdiction of the Florida Supreme Court to accept certified questions from the Supreme Court of the United States or a United States Court of Appeals. The relevant provisions of Florida law appear below.

(a) *Fla. Const.* art. V § 3(b)(6)

* * *

(b) JURISDICTION. — The supreme court.

* * *

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

* * *

(b) *Florida Statutes* § 25.031. Supreme Court authorized to receive and answer certificates as to state law from federal appellate courts.

The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.

(c) *Florida Statutes* § 25.032 Certification of questions of law; rules and regulations.

> The Supreme Court of this state is hereby authorized and empowered to collaborate with any and all other courts of last resort, of other states and of the United States, in the preparation and approval of uniform rules of court to make effective this and similar laws.

6. *Fla. R. App. P.* 9.150 Discretionary Proceedings To Review Certified Questions From Federal Courts.

> (a) Applicability. On either its own motion or that of a party, the Supreme Court of the United States or a United States court of appeals may certify a question of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.
>
> (b) Certificate. The certificate shall contain the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered. The certificate shall be prepared as directed by the federal court. It shall be certified to the Supreme Court of Florida by the clerk of the federal court.
>
> (c) Record. The Supreme Court of Florida, in its discretion, may require copies of all or any portion of the record before the federal court to be filed if the record may be necessary to the determination of the cause.

(d) Briefs. The brief of the party designated by the federal court as the moving party shall be served within 20 days of the filing of the certificate. Additional briefs shall be served as prescribed by rule 9.210.

(e) Costs. The costs of these proceedings shall be divided equally between the parties unless otherwise ordered by the court.

STATEMENT OF THE CASE

This case involves intercircuit conflict over an interpretation of a provision of Article 2 of the Uniform Commercial Code, as adopted by Florida.[1] Certiorari is sought because the Eleventh Circuit (per Judge Gerald Tjoflat) has rendered a decision in conflict with the Seventh Circuit (per Chief Judge Richard Posner). The consequences of the conflict are particularly significant in view of Florida's central role in the global commercial market. Despite certification procedures in place to address such matters, the Eleventh Circuit has nevertheless managed to tear asunder a key provision of uniform law and in the process of refusing to certify the issue, it has imposed a never before recognized minority view on Florida. The purpose of the Uniform Commercial Code is stated in § 1-102(2) which makes it clear that its adoption was intended:

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1. Petitioner is a Minnesota based publicly traded corporation which entered into a contract with respondents, Ohio based designers and manufacturers of heavy commercial machinery. The contract was to be performed in Florida for world-wide distribution of plastic eyeglass lenses.

* * *

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

* * *

This purpose becomes increasingly important in the shrinking universe of global commercial transactions. Like the other forty eight states adopting the UCC, Florida has determined that it wants to be a part of the uniform process. *Florida Statutes* § 671.102(2). Florida has also determined by its certification procedures that it wants to be consulted when an unresolved matter of Florida law comes before the Eleventh Circuit, and the court should have taken advantage of that opportunity rather than creating unnecessary confusion impacting interstate and international business transactions.

The essential facts are not in dispute. In October 1986, petitioner signed a contract with respondent Barth, a wholly owned subsidiary of respondent Nesco, to design, manufacture and install a system to automate production of the plastic lenses. After multiple completion date extensions had come and gone, petitioner stayed with the project because of its reliance on the respondents' assurances that the project would be completed eventually. However, despite fourteen promised completion dates which had come and gone, despite

repeated warnings issued to respondents by petitioner to deliver a workable system (spanning a period of more than twenty months beyond the final contract delivery deadline), despite petitioner's reliance upon respondents' assurances that the project would be completed, no workable system was ever delivered to petitioner. In early June of 1989, petitioner sued.

Prior to trial, the parties moved for summary judgment on the application of the UCC. Petitioner asserted that it did not apply and the trial court agreed (App. B). When the UCC issue arose again at trial, however, petitioner contended — and still contends — that the common law and the UCC are the same as to the dispositive "waiver" issue. Both the UCC and the common law require "detrimental reliance." Judge Posner's Seventh Circuit opinion in *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), which forms the basis of the intercircuit conflict, supports petitioner's position.

In any event, the jury was presented with all the evidence and returned verdicts against respondent Barth and respondent Nesco respectively for breach of contract and promissory estoppel in the amounts of $3 million and $2.1 million. The Eleventh Circuit reversed for a new trial as to respondent Barth only and for the entry of judgment in favor of respondent Nesco. It concluded that under § 2-209 of the UCC, "waiver" of a performance deadline by a buyer does not require "detrimental reliance" by a seller; that petitioner, as the buyer, waived the performance deadline *as a matter of law*; that the performance deadline was therefore extended for a "reasonable time"; and that a *new* jury should therefore decide whether the extended time for performance was reasonable or not.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 1332 in that it is a civil action where the matter in controversy exceeds the minimum jurisdictional threshold, exclusive of interests and costs, and is between citizens of different states.

REASONS FOR GRANTING THE WRIT

Introductory Statement

This case presents interrelated questions necessary to protect the integrity of the process by which states adopt and interpret uniform laws in an atmosphere of "cooperative judicial federalism." *Lehman Bros v. Schein*, 416 U.S. 386, 391 (1974). The conflict between the Eleventh Circuit (per Judge Tjoflat) and the Seventh Circuit (per Chief Judge Posner) involves a point of law adversely impacting business transactions in Florida — a center of global commerce. In creating the conflict, the Eleventh Circuit failed to permit Florida to determine a significant issue under its own statutory laws despite certification procedures in place giving it the right to address novel or unsettled issues. *Id.* Because the Florida Supreme Court is one of limited jurisdiction, it is unlikely that the "waiver" issue will ever come before that court. The Eleventh Circuit has therefore usurped Florida's role in determining its own law despite procedures which provide a vehicle for avoiding the very problem that has now been created. Controlling precedent is established which not only binds all federal district courts sitting in the Eleventh Circuit, but will undoubtedly influence the trial and intermediate appellate courts of Florida as well.

I. THE INTERCIRCUIT CONFLICT.

Florida is a world center of commercial trade and the Uniform Commercial Code is an important component of such trade. When litigation arises under Article 2, the interstate and international nature of such controversies normally means that litigation will be filed in federal court, and all federal courts sitting in Florida applying state law will necessarily be bound by the Eleventh Circuit's decision under Article 2 as if it were a decision of the Florida Supreme Court. The Eleventh Circuit's opinion has gone way beyond deciding a single case — it has effectively become a *de facto* opinion of the Florida Supreme Court, which is in conflict with the seminal decision authored by Chief Judge Posner.

The Eleventh Circuit's decision turned on its interpretation of "waiver" under 2-209(4) of the Uniform Commercial Code, adopted in Florida as *Florida Statutes* § 672.209(4). In analyzing the issue, the court *acknowledged* that it was creating express and direct conflict with Chief Judge Posner's decision in *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), the watershed case on waiver under Article 2. That case holds that to be effective a waiver must be supported by detrimental reliance.

In *Wisconsin Knife Works*, the buyer had contracted for the purchase of spade bit blanks to use in its manufacturing process. The parties had agreed that no modification of the contract would be binding unless made in writing and signed by the buyer's representative. When the seller later failed to meet the contractual deadline, the buyer sued for breach of contract. The seller claimed that based on the buyer's conduct, the buyer had waived the deadline. The district court agreed with the seller and entered judgment in its favor.

On appeal, the Seventh Circuit reversed. In so ruling, the court analyzed the question of whether the seller could nullify the contract term requiring that modifications be in writing simply by relabelling the buyer's conduct as a "waiver" under § 2-209(4), rather than calling it a "modification" under § 2-208(2). Writing for the court, Chief Judge Posner explained that the buyer's conduct could not be deemed a waiver without detrimental reliance on the part of the seller.

> If § 2-209(4), which as we said provides that an attempted modification which does not comply with subsection (2) can nevertheless operate as a "waiver," is interpreted so broadly that any oral modification is effective as a waiver notwithstanding § 2-209(2), both provisions become superfluous. . . . The path of reconciliation with subsection (4) is found by attending to the precise wording of (4). It does not say that an attempted modification "is" a waiver; it says that "it can operate as a waiver." It does not say in what circumstances it can operate as a waiver; but if an attempted modification is effective as a waiver only if there is reliance, then both §§ 2-209(2) and 2-209(4) can be given effect.

Id. at 1286-87 (emphasis added). The court went on to say:

> Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something in the way of credibility to the mere say-so of one party. . . . We find support for our proposed reconciliation of

> subsections (2) and (4) in the secondary literature. . . .

Id. (citations omitted). In reaching the conclusion that the two provisions are not superfluous and that a "waiver" is effective only where there is reliance by the non-waiving party, the Seventh Circuit appropriately construed "modification" and "waiver" in such a way as to give independent meaning to both subsections (2) and (4). As Chief Judge Posner stated in *Wisconsin Knife Works*, the draftsmen of § 2-209 "did not just want to give 'modification' another name — 'waiver'." 781 F.2d at 1288. To the contrary, the drafters *intended* independent meaning, yet the Eleventh Circuit's decision disrupts that intent and binds a significant portion of interstate and international commercial transactions in a major trade center to a minority view.

In *Flowers Ginning Corp. v. Arma, Inc.*, 106 F.3d 390 (4th Cir. 1997), the Fourth Circuit was called upon to interpret the issue of "waiver" under Georgia law and followed *Wisconsin Knife Works*. Thus, even Georgia law interpreted by a neighboring circuit is at variance with the Eleventh Circuit's view of the same provision. The "uniform law" is consequently not even uniform within the Eleventh Circuit, much less within the United States. *See also*, White & Summers, *Uniform Commercial Code*, § 1-6, at 33-34 (West 1995).

The intercircuit conflict alone serves as a basis for jurisdiction in this court. What truly makes the issue compelling, however, is the Eleventh Circuit's failure to recognize that Florida has procedures in place to afford it the opportunity to deal with its own novel or unresolved issues.

Lehman Brothers v. Schein, 416 U.S. 386 (1974). As explained below, *Lehman* strongly suggests that the Eleventh Circuit should have taken advantage of those procedures, rather than assuming that Florida would adopt an unprecedented minority view.

II. THE REFUSAL TO CERTIFY.

In *Lehman*, a decision of the Second Circuit was reversed based on that Court's refusal to certify a controlling issue of state law to the Florida Supreme Court. In *Lehman*, the Court gave a strong endorsement to certification where the process will likely tip the scale in favor of having a state court first address an important, yet unclear question. The Second Circuit found that Florida law was controlling but none was decisive. It then looked to precedent from other jurisdictions and concluded that Florida would more likely than not follow that precedent. Given the "novelty of the question and the great unsettlement of Florida law", this Court determined that the Second Circuit should have taken advantage of Florida's certification procedures. *Id.* at 391. In this case, certification is even more compelling than in *Lehman*. First, this matter involves an interpretation of uniform law as applied to a jurisdiction in the forefront of global commerce. And second, the court rejected all existing precedent in favor of its own maverick view. Consistent with this Court's reasoning in *Lehman*, the Florida certification procedure should have been utilized by the Eleventh Circuit in this case.

While petitions for certiorari are not normally granted to review what purports to be *solely* an interpretation of state law, *Leavitt v. Jane L.*, 518 U.S. 137 (1996) expresses this Court's willingness to listen where the alternative is to turn a "blind eye" to state law determinations that are far reaching in their impact, controversial, or perhaps even "plainly wrong." *Id.* at 144-45. *Compare California State Board of*

Equalization v. Chemehuevi Indian Tribe, 474 U.S. 91 (1986). Consistent with Justice Stevens' dissent in *Chemehuevi*, petitioner is not asking the Court to decide the waiver issue, but rather to remand this case so that Florida certification procedures can be followed.[2]

The threshold question, then, is whether the rationale expressed in *Lehman* and *Leavitt* applies to this case. That question is readily answered in the affirmative because of the nature of the problem, both legally and factually. Regarding the significance of the legal issue, Judge Posner in *Wisconsin Knife Works* resolved the tension between the requirement that modifications in commercial transactions must be in writing under § 2-209(2) and the view that everything else is a "waiver" under § 2-209(4). He reasoned that an attempted "unwritten" modification is a waiver only if there is detrimental reliance. Written modification would otherwise be an illusory requirement and *Wisconsin Knife Works* so holds. 781 F.2d 1280 (7th Cir. 1986). Surprisingly, Judge Tjoflat rejected *Wisconsin Knife Works* in favor of his own aberrational theory. Given the proliferation of multi-circuit, interstate and international commercial transactions in Florida, the state law determination by the Eleventh Circuit is indeed "far reaching", it is certainly "controversial", and perhaps even "plainly wrong". *Leavitt*, 518 U.S. at 144-45. But the important point here is that it should be left up to Florida to decide for itself. The Eleventh Circuit had an opportunity to ask the Florida Supreme Court for a definitive answer on this point, *Florida Statutes* § 25.031 and *Fla. R. App. P.* 9.150, and should have taken advantage of it, rather

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2. The Court noted in *Lehman* the Fifth Circuit's willingness to certify "is in part a product of frequent state repudiation of its interpretation of state law." 416 U.S. at 390 n.6.

than creating an unnecessary level of confusion. *See Diffenderfer v. Central Baptist Church of Miami Florida, Inc.*, 404 U.S. 412, 416 (1972) (Douglas, J., dissenting).

Beyond considerations of uncertainty and lack of uniformity brought about by the Eleventh Circuit's failure to certify the question, there is an issue of practicality. The transaction originated in 1987. The case was tried over several weeks in early 1995 and a verdict was rendered based on stipulated instructions. The case was pending in the Eleventh Circuit for nearly three years. While a new trial may well be inevitable, the Eleventh Circuit should have recognized all that is at stake in a remand of a complex matter where an unsettled issue of state law is the determining factor.

Wisconsin Knife Works should have been a "red flag" because it underscores an uncertainty that the Eleventh Circuit could have avoided by seeking the benefit of the law's authoritative construction from the Florida Supreme Court. *Cf., Virginia v. American Book Sellers Assoc., Inc.*, 484 U.S. 383, 396 (1988). The only requirement for certification under Florida law is that the issue must be determinative of the cause. The "waiver" issue is just that. *Compare State of Florida ex rel. Shevin v. Exxon*, 526 F.2d 266 (5th Cir. 1976). This court noted in *Bellotti v. Baird*, 428 U.S. 132, 150-51 (1976), quoting from *Lehman*, 416 U.S. at 391, that state certification procedures "save time, energy, and resources." It is important that the Eleventh Circuit acknowledge and apply those principles in order to build the "cooperative judicial federalism" envisioned by *Lehman* and *Bellotti*.

CONCLUSION

The Eleventh Circuit has rendered a decision directly in conflict with the seminal decision of the Seventh Circuit on a key provision of uniform commercial law. The Eleventh Circuit should have certified the issue to the Florida Supreme Court rather than imposing its own unprecedented view on Florida. The decision should be vacated and the case should be remanded in order for the court to reconsider the issue of certification.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED NOVEMBER 18, 1998

BMC INDUSTRIES, INC., Plaintiff-Appellee,
v.
BARTH INDUSTRIES, INC., Nesco, Inc., f.k.a. Nesco Management, Inc., Barth Industries Co. Limited Partnership, BIC Corporation, Nesco Holdings, Inc., f.k.a. Nesco, Inc., Defendants-Appellants.

Nos. 95-5137, 95-5338.

United States Court of Appeals,
Eleventh Circuit.

Nov. 18, 1998.

* * *

Before TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

This appeal arises from a contract entered into between BMC Industries, Inc., and Barth Industries, Inc., for the design, manufacture, and installation of equipment to automate BMC's production line for unfinished eyeglass lenses. Eighteen months after the delivery date set out in the contract had passed, BMC filed suit against Barth for breach of contract.[1] Barth, in turn, counterclaimed for breach of

1. As indicated in the text, infra, in addition to suing for breach of contract, BMC sought judgment against Barth on a variety of legal theories. All stemmed from the parties' contractual relationship.

contract. BMC's suit also included a claim against Barth's parent company, Nesco, Inc.[2] According to BMC, Nesco had orally promised to ensure Barth's completion of the contract, and therefore was liable under the theory of promissory estoppel for Barth's nonperformance.

A jury resolved the breach of contract and promissory estoppel issues in favor of BMC, and returned a verdict of $3 million against Barth and $2.1 million against Nesco. After denying Barth's and Nesco's alternative motions for judgment as a matter of law and for a new trial, the district court rendered judgment in accordance with the jury's verdicts, and Barth and Nesco appealed. We affirm the district court's decision denying Barth judgment as a matter of law. We conclude, however, that the court erroneously instructed the

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2. After BMC and Barth entered into the contract in question here, Barth reorganized its corporate structure. Barth Industries, LP, a limited partnership, was formed and received all of the assets and liabilities of Barth Industries, Inc. Barth Industries, Inc., then dissolved. Additionally, Nesco, Inc., which was the sole shareholder of Barth Industries, Inc., changed its name to Nesco Holdings, Inc., and became a limited partner of Barth Industries, LP, holding a 99% interest in the partnership. The remaining one percent interest was acquired by BIC Corporation, the limited partnership's general partner.

In its suit against Barth Industries, Inc., and Nesco, Inc., BMC named seven other parties, including Barth Industries, LP, and BIC Corporation, as defendants. By the time of trial, BMC had dismissed five of the seven from the case. The final judgment in this case was entered against Barth Industries, Inc. and Nesco Holdings, Inc. For ease of discussion, we refer to the Barth entities collectively as "Barth," and the Nesco entities collectively as "Nesco."

jury on the contract issues, and therefore vacate the judgment against Barth and remand the case for a new trial on these issues. As for Nesco, we conclude that the court should have granted Nesco judgment as a matter of law, and thus direct the district court to dismiss Nesco from this case.

I.

A.

BMC, through its Vision-Ease division, manufactures semi-finished polymer opthalmic lenses that are used in the production of eyeglasses. These lenses are created by an assembly-line process. First, an employee fills a mold assembly with a monomer fluid, and places the mold assembly on a conveyor. Next, the assembly is inspected and then heated and cured until the monomer solidifies into a plastic lens. Finally, the lens is removed from the mold assembly through a process called "de-clipping and de-gasketing"; an employee removes the spring clip holding the mold assembly together and slices open the rubber gasket that holds the lens. The lens is then packaged and sold to a finished eyeglass retailer.

In order to decrease labor costs, and thereby remain competitive with other lens manufacturers who were utilizing cheaper foreign labor, BMC decided to become the first company to automate portions of its lens manufacturing process. Consequently, in early 1986, BMC commissioned Barth to complete a preliminary design and feasibility study. Barth's subcontractor, Komech, finished the study in June 1986. Based on this study, Barth and BMC entered into a contract (the "Contract") which provided that Barth would

"design, fabricate, debug/test and supervise field installation and start up of equipment to automate the operations of mold assembly declipping, clip transport, mold assembly clipping, and mold filling." The Contract, which stated that it was governed by Florida law, listed a price of $515,200 and provided for delivery of four automated production lines by June 1987. The Contract also stated that time was of the essence.

On November 4, 1986, Barth and BMC executed a written amendment to the Contract, extending the delivery date by one month. In February 1987, Barth terminated Komech as design subcontractor, and hired another engineering company, Belcan, in its place. Belcan subsequently redesigned the automation equipment, which delayed Barth's progress and led the parties to execute the second (and last) written amendment, which extended the delivery date to "October 1987."

After this second amendment, Barth continued to experience technical problems and design difficulties that caused repeated delays. The parties did not extend the delivery date beyond October 1987 to accommodate these delays, however. Instead, Barth and BMC each demonstrated a willingness to continue performance under the Contract.

One such delay, for example, occurred in June 1987, when Belcan decided that the equipment design posed a risk of explosion because of the proximity of certain chemicals to electrical components. Although BMC perceived no such risk, it told Barth and Belcan to "go ahead" and redesign the equipment. Barth revised its estimated delivery schedule to

account for the resulting delay, listing December 1987 as the new delivery deadline. It sent this schedule to BMC with a cover letter that stated: "Please look over the attached & let me know what you think." BMC's response, if any, is not contained in the record.

This design problem was only one of many technical difficulties that developed; other problems arose with the filling nozzles and mold assembly springs, among other components. Consequently, by October 1987, the amended Contract's delivery deadline, Barth estimated that it could not deliver the equipment until April 1988. BMC executives were still anxious, however, to continue the automation project. Thus, during the spring of 1988, although they protested Barth's failure to deliver the equipment on time, these executives encouraged Barth to continue working on the project.

In June 1988, Barth completed the four automated de-clip/de-gasket machines and delivered them to BMC. Without the entire automated system, however, BMC could not fully test these machines; the whole production line had to be in place.

By August 1988, BMC's mounting apprehension about Barth's ability to perform led it to seek assurance that Barth would be able to complete performance under the Contract. In an effort to obtain such assurance, BMC executives met with Robert Tomsich, a Barth officer (and director) who also served as Nesco's president.[3] According to these executives,

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3. In addition, Tomsich was the chairman and sole shareholder of Nesco.

Tomsich ensured them that Barth would perform the Contract, that Nesco's resources were committed to the project, and that, in the future, BMC should deal directly with Nesco.

Although BMC had considered terminating the Contract and suing Barth for breach, BMC took neither step.[4] Instead, it continued to lead Barth and Nesco to believe that it was determined to finish the project; BMC collaborated with Barth's engineers to overcome difficulties, suggested design changes, and asked Barth whether more money (presumably provided by BMC) would help it complete the equipment in less time.

By January 1989, Barth still had not produced a functioning automation system. Due to time and cost overruns, Barth had invested over $1 million of its own money in the project. BMC previously had agreed to compensate Barth for these additional expenses; consequently, during that month, Tomsich asked BMC for $250,000 to cover some of Barth's cost overruns. One month later, BMC responded with a $100,000 payment, along with a letter stating that BMC was "insisting on Barth's adherence to the projected schedule," and was "not waiving any rights or remedies" for any breach, including "Barth's failure to meet the delivery dates specified in the contract." Barth's latest schedule called for delivery in June 1989.

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4. At trial, BMC offered the deposition testimony of its corporate general counsel, who stated that BMC was unwilling to continue the project unless Nesco ensured that the project would be completed.

Appendix A

Barth's delays and setbacks continued throughout the spring of 1989; but while BMC encouraged Barth to carry on, and continued to cooperate with Barth's engineers to solve problems, BMC also became increasingly impatient. In March, and again in April 1989, BMC pointed out Barth's unacceptable failure to meet deadlines.

Near the end of May 1989, Barth notified BMC that it had finally completed the mold assembly filling machine and that it would deliver the equipment F.O.B. Barth's dock in accordance with the Contract. BMC refused delivery of the mold assembly filler, and instead filed this lawsuit on June 5, 1989.

B.

BMC's complaint[5] contained fourteen counts.[6] Seven of the counts were based on representations made by Barth and

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5. Throughout this opinion, our references to BMC's complaint indicate BMC's Second Amended Complaint.

6. Our description of BMC's claims is hindered by the manner in which it pled its complaint. The complaint contains 154 paragraphs, the first 60 of which narrate the representations made by the parties prior to the formation of the Contract and what transpired between BMC and Barth, and BMC and Nesco, thereafter. Each of the 14 counts incorporates by reference these 60 paragraphs, regardless of whether the allegations thereof have any bearing on the legal theory (or theories) of recovery on which the count purports to be based. Moreover, each successive count incorporates by reference all of the allegations of the previous count; thus, count XIV incorporates verbatim counts I through XIII. Among the theories of recovery BMC

(Cont'd)

Nesco both prior to the formation of the Contract and during its performance, six of the counts sought to impose liability on Barth's and Nesco's successors in interest,[7] and one count sought recovery against Barth's directors under the Delaware Corporate Code. By the time of the final pretrial conference, BMC's complaint had been reduced to three claims: breach of contract against Barth (count I), fraudulent

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(Cont'd)
advanced in its case against Barth were breach of contract (count I); fraudulent misrepresentation (which induced BMC to enter into the Contract) (count II); false advertising, in violation of Fla. Stat. ch. 817.41 (count III); violation of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. ch. 501.204 (count IV); and "Revocation of Acceptance" (count V). Although BMC's case against Nesco based on its involvement in Barth's performance of the Contract (count VIII) was labeled "Equitable and Promissory Estoppel," we conclude that BMC's assertion is legally equivalent to a claim that in August 1988 Nesco guaranteed Barth's performance of the Contract after Barth breached the Contract by failing to meet its October 1987 deadline (according to BMC's breach of contract claim in count I).

BMC's complaint is a quintessential example of what we and other courts have characterized as "shotgun pleading." See, e.g., Cramer v. Florida, 117 F.3d 1258, 1263 (11th Cir.1997); Mason v. Allen (In re Allen), 150 B.R. 21, 22 (Bankr.E.D.Va.1993). Barth and Nesco responded in kind, rather than seeking a more definite statement or moving the district court to strike the immaterial allegations of the complaint. Given the defendants' willingness to answer the complaint as pled, the district court should have intervened on its own initiative and required the plaintiff to replead its case.

7. The counts that BMC lodged against Barth's and Nesco's successors in interest were premature in that they assumed that BMC had recovered money judgments against Barth (on one or more theories of liability asserted against Barth) and Nesco, and that these successors, having acquired Barth's and Nesco's assets, had rendered Barth and Nesco incapable of satisfying its judgment.

misrepresentation against Barth (count II), and promissory estoppel against Nesco (count VIII).

BMC's breach of contract count alleged that the second written amendment to the Contract established October 1987 as the deadline for Barth's performance. Because Barth failed to deliver the automated equipment by that date, Barth was in default of its contractual obligations. BMC sought damages for Barth's breach in the sum of $6.4 million. Two separate injuries suffered by BMC comprised this measure of damages. First, BMC sought to recover the labor costs that it would have saved had it been able to use the automated equipment rather than pay employees to produce the lenses manually. Because BMC executives predicted that the automated equipment would have a useful life of ten years, BMC sought these lost labor savings for the ten year period from October 1987 until October 1997. Second, BMC sought compensation for what it termed the "working capital effect." This effect is an estimate of the money BMC lost because its capital was tied up paying higher labor costs rather than being used for investment or being used to pay off the company's debt (and thus reducing the interest BMC paid to its creditors).

As an affirmative defense to BMC's breach of contract claim, Barth asserted that BMC's conduct after the October 1987 delivery date had passed amounted to a waiver of the delivery date under Article 2 of the Uniform Commercial Code ("UCC").[8] Although Barth failed to deliver the

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8. Florida has adopted its own version of the UCC. See Fla. Stat. chs. 670.101-680.111 (1997). For purposes of this opinion, "UCC" refers to Florida's version of the code. Florida's version of UCC's Article 2 is enacted as Fla. Stat. ch. 672.101-724 (1997). This opinion refers to the UCC and Article 2 interchangeably.

machines by October 1987, Barth argued, BMC executives urged Barth to keep working, BMC engineers continued to assist Barth in overcoming technical problems, and BMC executives agreed to increase the purchase price. Therefore, Barth claimed, BMC waived its entitlement to delivery of the machines in October 1987.

Additionally, Barth counterclaimed against BMC for breach of contract. Barth repeated its argument that BMC's conduct amounted to a waiver of the October 1987 delivery date, and asserted that the delivery deadline therefore became indefinite. Because Barth tendered the machines within a reasonable amount of time, Barth substantially performed its contractual obligations. Consequently, Barth claimed, BMC's refusal to accept delivery of the machines in May 1989 constituted breach of the Contract. Barth sought damages totaling $1.13 million, which consisted of the original purchase price of $515,200 specified in the Contract, plus Barth's cost overruns that BMC had agreed to reimburse.

BMC's fraudulent misrepresentation count alleged that Barth induced BMC into signing the Contract by making several false representations. Among them were Barth's statements that it had experience in designing and manufacturing custom machinery similar to the automated equipment BMC sought to purchase, that it had the ability to design and manufacture the automated equipment, and that the equipment would function according to the specifications in the Contract. BMC sought judgment on this claim for compensatory damages in the sum of $6.4 million, as well as punitive damages.

Appendix A

As an affirmative defense, Barth responded that BMC fraudulently failed to inform Barth of problems BMC was unable to solve in its manual lens production process, and that BMC misrepresented that problems experienced by the automated equipment did not occur when BMC produced lenses manually. Barth claimed that it would not have entered into the Contract had BMC not made these misrepresentations; BMC's own fraud, therefore, barred BMC from recovery on its claims against Barth. Barth also counterclaimed against BMC for fraud, and sought both compensatory and punitive damages.

BMC's promissory estoppel count against Nesco alleged that in August 1988 (after Barth was already in breach for failure to deliver the equipment by the October 1987 delivery date), Nesco promised to commit its resources to the project and become jointly responsible with Barth for its completion. BMC alleged that it was prepared to terminate the contract and sue Barth for breach, but Nesco's promise induced BMC to delay from taking either step in order to allow Barth and Nesco additional time to perform. Consequently, BMC claimed, Nesco was liable for Barth's breach of the Contract.

In response, Nesco argued that BMC's promissory estoppel claim was barred by Florida's statute of frauds. Nesco asserted that BMC's claim was equivalent to a claim that Nesco orally guaranteed Barth's performance after that performance was already past due. Because a guarantee of a past-due debt is unenforceable unless it is reduced to writing, Nesco claimed, the statute of frauds barred BMC's claim.

At the pretrial conference, the district court concluded that the Contract was predominantly a transaction in services

rather than goods, and therefore held that Article 2 of the UCC did not apply. Instead, Florida common law would govern the Contract. That law does not recognize a waiver of a contract term unless the waiver is supported by detrimental reliance or consideration. Consequently, in order to establish a waiver of the October 1987 delivery date, Barth would have to show that it detrimentally relied on, or gave consideration for, BMC's waiver of the delivery date.

The case proceeded to trial on the breach of contract, fraudulent misrepresentation, and promissory estoppel issues. At the close of evidence, the district court concluded that there was insufficient evidence of fraudulent misrepresentation by either BMC or Barth, and therefore dismissed each side's fraud claims.

The court submitted the remaining issues to the jury using a special verdict form that contained eight interrogatories. In response to the first interrogatory, which asked, "Did Barth breach its contract with BMC?" the jury answered affirmatively, and awarded BMC $3,001,879 in damages. The jury also answered "Yes" to the third interrogatory, which asked, "Is Nesco liable to BMC on the basis of promissory estoppel?" and awarded BMC an additional $2,137,453 in damages. The jury responded "No" to the remaining interrogatories, which asked whether BMC was liable on Barth's counterclaims.

C.

On appeal, Barth contends that the district court erred when it concluded that the UCC did not apply to the Contract,

and thus did not govern the waiver issue. Had the court applied the UCC, Barth argues, it would have concluded that BMC waived the October 1987 delivery date, and therefore breached the Contract by refusing to accept delivery in May 1989.[9] Having reached that conclusion, the court would have granted Barth's motion for judgment as a matter of law on the breach of contract issues, and awarded Barth damages in the sum of $1.13 million. Assuming a dispute of material fact on the waiver issue, Barth contends alternatively that BMC's judgment on the breach of contract count should be vacated, and the case remanded for a new trial on that count and its breach of contract counterclaim.

Nesco contends that BMC's promissory estoppel claim is nothing more than a suit on an oral guarantee of a past-due obligation and, as such, is barred by the statute of frauds. Accordingly, the district court erred in denying its motion for judgment as a matter of law, and the case should be remanded with instruction that the court dismiss it from the case.[10]

In part II.A of this opinion, we consider whether the Contract was predominantly a transaction in goods (and thus

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9. Barth argues that BMC's rejection of the machines constitutes a breach because BMC failed to provide reasonable notice of termination as required by the UCC.

10. Nesco also claims that: (1) the evidence was insufficient to support BMC's claim against Nesco, and (2) even if Nesco is liable, its liability can only be joint and several with Barth's because of a pre-verdict stipulation entered into by the parties, as well as statements by BMC that it sought only joint and several liability. Given our disposition, it is unnecessary to discuss these points.

governed by the UCC) or in services (and thus governed by the common law), and conclude that it was a transaction in goods. In part II.B we examine whether BMC waived the October 1987 delivery date through its conduct after the delivery date had passed. We conclude that BMC waived the delivery date as a matter of law, but that a triable issue of fact remains as to whether Barth tendered the equipment (which BMC rejected) within a reasonable time under the circumstances. We therefore vacate the judgment entered against Barth, and remand the case for a new trial on the reasonableness issue.[11] Finally, in part III we determine whether BMC's promissory estoppel claim against Nesco is barred by the statute of frauds. We conclude that it is barred, and therefore direct the district court to grant judgment for Nesco.

II.

A.

The district court held that the Contract was predominantly for services rather than goods, and that the UCC was therefore inapplicable. We disagree.

The UCC's Article 2 only applies to "transactions in goods." Fla. Stat. ch. 672-102 (1997). Goods are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 678) and things in action." Fla.

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11. In remanding the case for a new trial, we necessarily affirm the district court's denial of Barth's motion for judgment as a matter of law on the breach of contract claims (brought by BMC and Barth).

Stat. ch. 672.105(1) (1997).[12] A contract that is exclusively for services, therefore, is not governed by Article 2. Courts are frequently faced, however, with contracts involving both goods and services — so-called "hybrid" contracts. Most courts follow the "predominant factor" test to determine whether such hybrid contracts are transactions in goods, and therefore covered by the UCC, or transactions in services, and therefore excluded.[13] See Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir.1974). Under this test, the court determines "whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom)."[14] Id. (footnotes omitted). At least one Florida court has implicitly

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12. "Identification to the contract" occurs "when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers." Fla. Stat. ch. 672.501(1)(b) (1997) (discussing identification in the context of receiving an insurable interest in goods).

13. A few courts do not categorize hybrid contracts as either transactions in goods or services, but rather apply the UCC only to the sale of goods elements of the contract. See, e.g., Foster v. Colorado Radio Corp., 381 F.2d 222, 226 (10th Cir.1967).

14. We note that at least some courts believe the trend is to apply Article 2 to hybrid contracts. See Cambridge Plating Co. v. Napco, Inc., 991 F.2d 21, 24 (1st Cir.1993) ("[T]he general trend [is] to view such mixed contracts as governed by the UCC."); United States ex rel. Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568, 572 n. 2 (9th Cir.1978) ("The modern trend is to apply Article 2 to such mixed sales/services contracts.").

adopted the predominant factor test. See United States Fidelity & Guar. Co. v. North Am. Steel Corp., 335 So.2d 18, 21 (Fla. 2d DCA 1976) ("Since the predominate nature of the transaction was the furnishing of a product rather than services, we believe that the fabricated pipe could properly be characterized as goods.").

Although courts generally have not found any single factor determinative in classifying a hybrid contract as one for goods or services, courts find several aspects of a contract particularly significant. First, the language of the contract itself provides insight into whether the parties believed the goods or services were the more important element of their agreement. Contractual language that refers to the transaction as a "purchase," for example, or identifies the parties as the "buyer" and "seller," indicates that the transaction is for goods rather than services. See Bonebrake, 499 F.2d at 958 (stating that language referring to "equipment" is peculiar to goods rather than services); Bailey v. Montgomery Ward & Co., 690 P.2d 1280, 1282 (Colo.Ct.App.1984) (holding that a contract that identifies the transaction as a "purchase" and one of the parties as the "customer" signals a transaction in goods); Meeker v. Hamilton Grain Elevator Co., 442 N.E.2d 921, 923 (Ill.App.Ct.1982) (stating that a contract that calls the parties "seller" and "purchaser" indicates a contract for goods).

Courts also examine the manner in which the transaction was billed; when the contract price does not include the cost of services, or the charge for goods exceeds that for services, the contract is more likely to be for goods. See Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 743 (2d

Cir.1979) (stating that a bill that does not include services indicates a contract for goods); Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F.Supp. 262, 275 & n. 15 (D.Me.1977) (holding that the contract at issue was for services after noting that the bill did not allocate costs between services and goods, and the evidence showed that the cost of the goods was less than half of the contract price).

Movable goods is another hallmark of a contract for goods rather than services. The UCC's definition of goods makes clear the importance of mobility in determining whether a contract is for goods; the UCC states that goods are "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." Fla. Stat. ch. 672.105(1) (1997). Noting the importance of mobility, one Florida court held that a contract to edit and publish printed materials was a contract for goods after stating that "[t]he items allegedly furnished by the appellant were specially produced or manufactured and were movable."[15] Lake Wales Publ'g Co. v. Florida Visitor, Inc.,

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15. Mobility is measured as of the time the goods are identified to the contract rather than after the contract is completed. Consequently, equipment or materials that were movable, but were installed and became immobile fixtures as part of the contract, are still "movable" within the UCC's meaning. See Bonebrake, 499 F.2d at 959 n. 12. Thus, for example, contracts for the sale and installation of equipment are frequently (but not always) held to be transactions in goods. Construction contracts, however, such as those for construction of a swimming pool or house, are usually held to be transactions in services. Although construction contracts typically involve materials that qualify as goods (such as concrete or roofing tiles, for example), the services element of such contracts is usually held to be dominant. See 1 James J. White & Robert S. Summers, Uniform Commercial Code § 9-2 (4th ed.1995).

335 So.2d 335, 336 (Fla. 2d DCA 1976); see also Smith v. Union Supply Co., 675 P.2d 333, 334 (Colo.Ct.App.1983) (holding that a contract to provide the materials and labor for installation of a new roof was a contract for goods because "[t]he materials to be installed . . . were 'movable at the time of identification to the contract for sale' " (quoting Colorado's version of the UCC)).

In this case, the district court relied primarily on Lincoln Pulp & Paper for its conclusion that the contract was for services rather than goods. The contract at issue in Lincoln Pulp & Paper involved the design and construction of a heat and chemical recovery unit in a pulp mill. The district court noted that, similar to Lincoln Pulp & Paper, the Contract obligated Barth to design, manufacture, test, and construct equipment, and also that the Contract's price did not allocate expenses between services and materials. The district court concluded that this case was sufficiently analogous to Lincoln Pulp & Paper to warrant the same result: a determination that the Contract was for services rather than goods.

The question whether a contract is predominantly for goods or services is generally one of fact. See Allmand Assocs., Inc. v. Hercules Inc., 960 F.Supp. 1216, 1223 (E.D.Mich.1997). When there is no genuine issue of material fact concerning the contract's provisions, however, a court may determine the issue as a matter of law. See id. Concluding that there are no material issues of fact as to the terms of the contract, the district court decided as a matter of law that the contract was for services. We review questions of law de novo. See Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs, 87 F.3d 1242, 1246 (11th Cir.1996).

Appendix A

Applying the "predominant factor" test to the Contract, we conclude that it was predominantly a transaction in goods. We reach this conclusion based on the contractual language, the circumstances surrounding the Contract, and the nature of the goods at issue.

Our starting point is the language of the Contract itself, which provides a number of indicia that the parties intended a contract for goods rather than services. First, the Contract is titled "PURCHASE ORDER," a reference that is used repeatedly throughout the document. This title is most instructive, as the parties have chosen to identify their agreement with a name that is almost exclusively used for transactions in goods. Second, the parties refer to themselves in the Contract as the "Buyer" and "Seller." Third, the Contract states that it is a purchase order "for the fabrication and installation of automated equipment." (emphasis added). All of this contractual language is "peculiar to goods, not services," Bonebrake, 499 F.2d at 958, and indicates that the parties had a contract for goods in mind.

Additionally, the Contract involves movable goods. Barth designed and fabricated the automated equipment in its own facilities, and planned to move the equipment to BMC's plant only once it was completed. Barth's original offer, which was incorporated into the Contract, included the term "F.O.B. Barth dock," meaning that the equipment was tendered to BMC once it was delivered to Barth's loading dock. Consequently, although Barth was still obligated to install and debug the equipment, it was clearly movable at the time it was identified to the Contract.[16]

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16. BMC correctly points out that the mere involvement of movable goods in a contract does not mean it is a transaction in

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Lincoln Pulp & Paper is distinguishable from this case. The district court stated that the Contract price, similar to Lincoln Pulp & Paper, does not allocate costs between services and goods. The district court failed to note, however, that the Contract allocates payments according to delivery of automated equipment; the Contract's payment schedule calls for the delivery and acceptance of each automated equipment line to be met by a $70,050 payment from BMC. If the Contract price were being paid predominantly for Barth's design and engineering services as BMC claims, then the parties would have pegged payments to completion of the engineering and design services, not to the delivery of equipment. Furthermore, while the cost of services made up over half of the contract price in Lincoln Pulp & Paper, the opposite appears to be true in this case. A total of $280,200, which is over half of the contract price, is pegged to the delivery of equipment.

Finally, we note that the court in Lincoln Pulp & Paper stated that "[a] sale of equipment is not removed from the scope of Article 2 merely because the equipment was specially

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goods rather than services. See Whitmer v. Bell Telephone Co., 361 Pa.Super. 282, 522 A.2d 584, 587 (1987). In fact some movable goods must be involved in order for the contract to be labeled a "hybrid"; otherwise, the contract would clearly be a transaction in services, and the UCC would not apply. What is significant, however, is that the goods at issue here were movable when completed, unlike some contracts that only involve movable materials, which are subsequently used to construct an immovable fixture (such as a house or swimming pool). While the mobility of the completed goods is not dispositive, it is one factor to be considered.

designed and manufactured before delivery or installed by the supplier." 436 F.Supp. at 276 n. 16. In fact, it is not surprising that the Barth-BMC Contract included such a significant services element (i.e., design and manufacturing). Because no other company had successfully automated its eyeglass lens production, Barth had to spend considerable time designing this first-of-its-kind machinery. This necessary services element, however, does not remove the Contract from the category of agreements for specially designed and manufactured equipment to which Article 2 applies.

The other two cases on which BMC relies are also inapposite. Both cases involved parties that clearly contemplated a contract for services. The first case, Wells v. 10-X Mfg. Co., 609 F.2d 248 (6th Cir.1979), involved the production of cloth hunting shirts. In that case, however, the buyer provided all of the materials (except thread) that the manufacturer used to produce the clothing. Id. at 225. Consequently, the manufacturer did not sell goods, only the service of turning the materials into a finished product.

The other case BMC cites, Inhabitants of the City of Saco v. General Elec. Co., 779 F.Supp. 186 (D.Me.1991), involved a contract for the design and construction of a solid waste disposal facility. That case is also distinguishable because it involved a typical construction contract for a non-movable product — the disposal facility. The only movable goods were the materials that were used to construct the immobile structure. Even more significantly, the contractual language in that case clearly identified the contract as a transaction in services. The contract stated that its purpose was "for the

furnishing of services in Phase I of the project, and 'to establish the conditions on which Contractor [GE] will propose to furnish services under Phase II'." Id. at 197 (first and second emphases added). Not only did the language state that the contract was for services, it also referred to one of the parties as the "Contractor," a term typically used in services transactions.

B.

Having determined that the UCC governs this case, we must next apply Article 2's waiver provision to the Contract. The UCC waiver provision states in relevant part:

> (2) A signed agreement which excludes modification or recission except by a signed writing cannot be otherwise modified or rescinded. . . .
>
> . . . .
>
> (4) Although an attempt at modification or recission does not satisfy the requirements of subsection (2) or (3) [regarding the statute of frauds] it can operate as a waiver.
>
> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would

> be unjust in view of a material change of position in reliance on the waiver.

Fla. Stat. ch. 672.209 (1997) (emphasis added).[17]

1.

Although the UCC does not specifically lay out the elements of waiver, we have stated that waiver requires "(1) the existence at the time of the waiver a right, privilege, advantage, or benefit which may be waived; (2) the actual constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage, or benefit." Dooley v. Weil (In re Garfinkle), 672 F.2d 1340, 1347 (11th Cir.1982). Conduct may constitute waiver of a contract term, but such an implied waiver must be demonstrated by clear evidence. See American Somax Ventures v. Touma, 547 So.2d 1266, 1268 (Fla. 4th DCA 1989). Waiver may be implied when a party's actions are inconsistent with continued retention of the right. See First Pa. Bank, N.A. v. Oreck, 357 So.2d 743, 744 (Fla. 4th DCA 1978).

As an initial matter, we must determine whether, under the UCC, waiver must be accompanied by detrimental reliance. Although it is settled that waiver under Florida common law must be supported by valid consideration or

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17. The Contract included a provision requiring all modifications to be in writing. Although the parties therefore did not successfully modify the Contract, we apply chapter 672.209 to determine whether BMC's conduct constituted a waiver of the October 1987 delivery date.

detrimental reliance, see Masser v. London Operating Co., 106 Fla. 474, 145 So. 79, 83 (1932), courts disagree on whether the UCC retains this requirement. We conclude, however, that the UCC does not require consideration or detrimental reliance for waiver of a contract term.

Our conclusion follows from the plain language of subsections 672.209(4) and (5). While subsection (4) states that an attempted modification that fails may still constitute a waiver, subsection (5) provides that the waiver may be retracted unless the non-waiving party relies on the waiver. Consequently, the statute recognizes that waivers may exist in the absence of detrimental reliance — these are the retractable waivers referred to in subsection (5). Only this interpretation renders meaning to subsection (5), because reading subsection (4) to require detrimental reliance for all waivers means that waivers would never be retractable. See Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1291 (7th Cir.1986) (Easterbrook, J., dissenting) (noting that reading a detrimental reliance requirement into the UCC would eliminate the distinction between subsections (4) and (5)). Subsection (5) would therefore be meaningless.

At least one Florida court implicitly agrees with this conclusion; in Linear Corp. v. Standard Hardware Co., 423 So.2d 966 (Fla. 1st DCA 1982), the court held that a contract term had been waived despite the absence of any facts showing detrimental reliance. The court in Linear addressed a contract between a manufacturer and a retailer for the sale of electronic security devices. The contract included a provision stating that the manufacturer would not repurchase any devices the retailer was unable to sell, and another term

providing that contract modifications must be in writing. Despite this contractual language, the retailer filed suit claiming that the manufacturer subsequently made an oral agreement to repurchase unsold devices, but failed to adhere to this oral agreement.

Citing chapter 672.209(4), the court concluded that the parties' conduct demonstrated that they had waived the requirement that modifications be in writing, and therefore gave effect to the oral modification. See id. at 968. The court recognized this waiver despite the apparent absence of any detrimental reliance by the retailer[18] — in fact the court never even mentioned any reliance requirement for waiver under the UCC. Consequently, the court implicitly held that a contract term could be waived without the existence of detrimental reliance by the non-waiving party.

Although other courts have held that waiver requires reliance under the UCC, those courts have ignored the UCC's plain language. The leading case espousing this view of waiver is Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir.1986) (addressing section 2-209 of

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18. The retailer also claimed that the manufacturer orally agreed to repurchase unsold units contemporaneous with signing the contract. Thus it may appear that the manufacturer's oral agreement lulled the retailer into signing the written contract, and therefore that the waiver was supported by detrimental reliance. The court, however, held that evidence of this contemporaneous oral agreement was barred by the parol evidence rule. See Linear Corp., 423 So.2d at 968. Consequently, the court could not have used this contemporaneous oral agreement to satisfy any reliance requirement for waiver.

the model version of the UCC, from which Florida adopted section 672.209 verbatim), in which a panel of the Seventh Circuit addressed a contract that included a term prohibiting oral modifications, and considered whether an attempted oral modification could instead constitute a waiver. Writing for the majority, Judge Posner concluded that the UCC's subsection (2), which gives effect to "no oral modification" provisions, would become superfluous if contract terms could be waived without detrimental reliance. Judge Posner reasoned that if attempted oral modifications that were unenforceable because of subsection (2) were nevertheless enforced as waivers under subsection (4), then subsection (2) is "very nearly a dead letter." Id. at 1286. According to Judge Posner, there must be some difference between modification and waiver in order for both subsections (2) and (4) to have meaning. This difference is waiver's detrimental reliance requirement.[19]

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19. Contrary to our reasoning above, Judge Posner claims that reading a reliance requirement into waiver under subsection (4) is not inconsistent with subsection (5). According to Judge Posner, subsection (5) is broader than subsection (4), covering waivers other than mere attempts at oral modification. Judge Posner argues as an example that subsection (5) covers express waivers that are written and signed. See id. at 1287. In dissent, however, Judge Easterbrook convincingly dissects this argument. As Judge Easterbrook explains, subsection (5) is narrower than subsection (4) — limiting the effect of waivers that are not detrimentally relied upon — not the reverse as Judge Posner claims. Furthermore, Judge Easterbrook demonstrates that subsection (5) cannot cover express written and signed waivers because such writings are not waivers, but rather effective written modifications under subsection (2). See id. at 1291 (Easterbrook, J., dissenting).

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Judge Posner, however, ignores a fundamental difference between modifications and waivers: while a party that has agreed to a contract modification cannot cancel the modification without giving consideration for the cancellation, a party may unilaterally retract its waiver of a contract term provided it gives reasonable notice. The fact that waivers may unilaterally be retracted provides the difference between subsections (2) and (4) that allows both to have meaning. We therefore conclude that waiver under the UCC does not require detrimental reliance. Consequently, without reaching the issue of detrimental reliance, we consider whether BMC waived the Contract's October 1987 delivery date.

2.

Applying the elements of waiver to the facts before us, we hold as a matter of law that BMC waived the October 1987 delivery date. The October 1987 delivery date was a waivable contract right, of which BMC had actual knowledge. We also conclude that BMC's conduct impliedly demonstrated an intent to relinquish that right.

The most cogent evidence of this waiver is BMC's own representation of its relationship with Nesco. Throughout this litigation, BMC has maintained that Nesco, beginning in August 1988, "stepped in and promised to complete the project. In doing so, Nesco expressly represented that all of its resources were committed to the project, and instructed BMC to deal solely with Nesco." According to BMC, therefore, Nesco voluntarily became liable, in the fall of 1988, for Barth's completion of the project. By that time, however,

the October 1987 delivery date had already passed. If, as BMC claims, the contract was already breached, then Nesco could never have performed its obligations; Nesco was in breach of its promise as soon as that promise was made, and could have been sued by BMC the next day. For Nesco's promise to have meaning,[20] BMC must have given Barth and Nesco additional time to perform — in other words, BMC must have waived the October 1987 delivery date.

BMC argues, however, that while it agreed to delay enforcing its rights against Barth in return for Nesco's promise, it did not waive those rights. BMC's argument defies logic. According to this theory, BMC could sue Barth and Nesco at its whim. Consequently, Nesco miraculously could have completed the project the day after its promise, and still have been fully liable to BMC for Barth's breach of contract. Nesco had nothing to gain and everything to lose from such an agreement.

BMC's own complaint buttresses our conclusion that BMC waived the October 1987 delivery date. According to BMC's complaint, Nesco promised "that Barth would meet dates, performance and reliability criteria under the agreement, as amended," and that Nesco "ensure[d] that the equipment was timely completed and delivered to BMC in Florida." (emphasis added). Because the October 1987 delivery date had already passed, however, Barth could not "meet dates" or "timely" complete the equipment unless the delivery date had been extended.

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20. We address Nesco's promise in part III, infra.

Furthermore, BMC's course of dealing with Barth evidenced BMC's waiver of the October 1987 delivery date, because BMC failed timely to demand compliance with that contract term or terminate the Contract and file suit. When a delivery date passes without the seller's delivery, the buyer must object within a reasonable time and warn the seller that it is in breach. See KLT Indus., Inc. v. Eaton Corp., 505 F.Supp. 1072, 1079 (E.D.Mich.1981); see also Harrison v. City of Tampa, 247 F. 569, 572 (S.D.Fla.1918) ("I do not recognize any principle by which one party to a contract, after a breach by the other party, may continue acting under such contract to some future time, and then abrogate the contract by reason of such former breach.").[21]

Although BMC maintained at trial that Barth breached the contract as of October 1987, BMC did not tell Barth it intended to terminate the contract and hold Barth liable for the breach until May 1989. In fact, the earliest indication from BMC that it was considering termination was August 1988, when BMC executives met with Tomsich to seek assurance that Barth would perform. As we have already stated, however, the result of that meeting was a waiver of the October 1987 delivery date, not a timely exercise of BMC's right to terminate the Contract. BMC did not warn Barth in earnest of its intent to terminate until February 1989, when BMC sent Barth a letter along with $100,000 of the $250,000 payment Tomsich had requested at the August 1988

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21. Cf. Green Constr. Co. v. First Indem. of Am. Ins. Co., 735 F.Supp. 1254, 1262 (D.N.J.1990) (holding that the delivery date was not waived because the buyer warned the seller to comply with the delivery schedule immediately after the first delivery date had passed, and therefore indicated an intent to hold seller to the contract terms).

meeting. This letter warned Barth that BMC was not waiving its rights and remedies for Barth's failure to meet contractual delivery dates. BMC warned Barth again in March when it sent a letter advising of its intent to "hold [Barth] responsible, both for the initial breach and for all failures to meet subsequently promised dates."

Until 1989, however, BMC continued to act as though both parties were bound by the Contract and that Barth was not in default of its obligations: the October 1987 delivery date passed without comment from BMC; engineers from BMC frequently provided advice or assistance to help Barth personnel overcome technical problems; BMC executives frequently visited Barth's production facilities and encouraged Barth to continue working to complete the equipment; BMC even continued to spend money on the project — in December 1987, over one month after the October 1987 delivery date had passed, BMC purchased an additional $71,075 worth of springs and tooling for the machines. In sum, rather than terminating the Contract, or at least warning Barth that it was in breach after the October 1987 delivery date had passed, BMC continued to act as though the Contract remained in effect.

This is not to say that BMC never complained that Barth had missed deadlines; BMC executives frequently expressed their concern and disappointment that the project was so far behind schedule. On April 5, 1988, for example, the Chairman, President, and CEO of BMC sent a letter to Barth in which he stated: "[T]he project is well behind schedule, and each day of delay represents lost savings for Vision-Ease. I hope that Barth will exert every effort to ensure the speedy

completion and installation of the equipment and avoid any further delay." But while BMC complained of delays, it never declared Barth in default or terminated the contract — instead, BMC told Barth to keep working. After Barth had spent an additional eighteen months of time and money and, according to Barth, was prepared to deliver the machines, however, BMC suddenly decided to terminate the Contract. This BMC could not do.[22]

The UCC states that when a contractual delivery date is waived, delivery must be made within a reasonable time. See Fla. Stat. ch. 672.309(1) (1997); KLT Indus., Inc. v. Eaton Corp., 505 F.Supp. 1072, 1079 (E.D.Mich.1981). Consequently, because BMC waived the October 1987 delivery date, Barth was only obligated to deliver the machines within a reasonable time period. We remand this case to the district court for a new trial on the question of whether Barth tendered the machines within a reasonable time period.[23]

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22. Although Barth contends on appeal that several district court jury instructions were erroneous and prejudicial, we need not reach this question given our holding that BMC waived the October 1987 delivery date and our consequent remand for retrial.

23. On remand, if the jury concludes that Barth did not deliver the machines within a reasonable time period, then BMC will prevail on its breach of contract claim against Barth. BMC's damages should then be calculated according to Fla. Stat. ch. 672.713 (1997). If instead, however, the jury finds that BMC terminated the contract before a reasonable time had passed, then Barth will prevail on its counterclaim. BMC has stipulated that Barth is entitled to recover $1.13 million if it prevails.

Appendix A

III.

BMC's promissory estoppel claim against Nesco is based on Tomsich's representation to BMC executives, in August 1988, that Nesco would commit its own resources to the project and that Barth would complete its performance under the Contract.[24] Tomsich made this representation in response

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24. In addition to Tomsich's August 1988 representation, BMC's claim is based on a promise allegedly made by Nesco in 1986, before the Contract was signed. According to BMC, Nesco promised in 1986 to support Barth's work on the project in order to induce BMC to sign the Contract. To support this assertion, BMC offered promotional materials about Nesco that Barth gave to BMC before the Contract was signed. These brochures emphasized Nesco's engineering abilities and experience and discussed each of Nesco's subsidiaries, including Barth. Along with these brochures, BMC claimed, Barth personnel assured BMC that "Barth was not a stand alone, it was backed up by the Nesco group." BMC contended at trial that it relied on Barth's affiliation with Nesco, as presented in these brochures and by Barth personnel, when it signed the Contract.

Without explanation, the district court ignored this aspect of BMC's promissory estoppel claim, and focused only on Tomsich's August 1988 representation when it presented that claim to the jury. We conclude, however, that the court rightly excluded Nesco's alleged 1986 promise from its presentation of BMC's claim to the jury, because the evidence of any Nesco promise made before the Contract was signed is insufficient as a matter of law. As for the statement by Barth personnel that Nesco was supporting Barth, this evidence reveals no promise actually made by Nesco. It was Barth, not Nesco, that promised Nesco's support for the project before the Contract was signed. Nesco cannot be held liable for failing to deliver on a promise that it did not make.

(Cont'd)

to the executives' statement that BMC was prepared to terminate the Contract and sue Barth for breach.[25] BMC accepted Tomsich's assurance, and decided to withhold suit.

(Cont'd)

Nor do the Nesco brochures contain any promise made by Nesco. At trial, BMC presented language from the brochures to demonstrate a promise, such as the following: "All together, these [Nesco-owned] companies offer a full spectrum of services required by all industries, large and small: Engineering and product design." BMC contends that such language constituted a promise that Nesco would back up the projects undertaken by its subsidiaries. BMC's contention is frivolous; the brochures were merely pamphlets designed to provide information about the services offered by Nesco's subsidiaries. Furthermore, it was Barth, not Nesco, that provided these brochures to BMC.

BMC also pointed out that, among other subsidiaries (including Barth) presented in the brochures, the pamphlets discussed the Nesco Design Group, Inc. BMC contended at trial that its executives interpreted the brochures to mean that while Barth would manufacture the machines, Nesco would assist Barth in creating the machines' design. The brochures, however, draw no connection between Barth and Nesco Design Group, or any other Nesco company, aside from the fact that they are all owned by Nesco. We fail to understand how a brochure that describes the abilities of a corporation's subsidiaries could lead anyone to believe that the subsidiaries would pool their resources and experience on every contract. In sum, the evidence was insufficient to establish any representation, much less a promise, by Nesco to BMC prior to the execution of the Contract.

25. At trial, BMC introduced Tomsich's representation through the deposition testimony of BMC's corporate general counsel, who stated that Robert Tomsich assured BMC, in August 1988, that "all of Nesco's resources were committed to this project in seeing it go, that all of the engineering talents in the Nesco organization were available as necessary to help Barth."

Nesco contends that this claim is barred by the statute of frauds. A guarantee of a past-due debt is void under the statute of frauds in the absence of a writing; according to Nesco, BMC's claim, while labeled "promissory estoppel," is legally equivalent to a claim that Nesco guaranteed Barth's performance after Barth was already in default. BMC cannot deny this fact, Nesco argues, because (1) the evidence showed that Tomsich's promise was made nine months after Barth had breached the Contract, and (2) BMC's legal position throughout this litigation has been that Tomsich's promise was made after Barth had breached the Contract. By taking the legal position that Barth breached the Contract when it failed to deliver the equipment in October 1987 and that BMC never waived that breach, BMC impliedly adopted the position that Nesco's August 1988 promise amounted to a guarantee. We agree.

In light of the jury's verdict on the promissory estoppel claim, we must assume that, in August 1988, Tomsich promised BMC that Nesco would ensure Barth's performance of the Contract, and that, relying on this promise, BMC postponed its suit against Barth for breach of contract. Because Tomsich wore two hats — as an officer of Barth and of Nesco — when he met with BMC's executives and made the promise, this scenario yields three legal possibilities: (1) a new three-party agreement replaced the original Contract, with BMC on one side and Barth and Nesco jointly on the other; (2) a novation occurred, whereby Nesco replaced Barth (and assumed Barth's liability) under the original Contract; or (3) Nesco guaranteed Barth's past-due

performance.[26] Under the first two possibilities, Barth would have been released from liability for its breach of the Contract.[27] BMC eschewed these possibilities, however, when it sued Barth for breach. Although BMC disavows that Nesco's promise constituted a guarantee, that is the only remaining legal possibility. In short, we adhere to the time-

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26. Although we concluded in part II.B.2, supra, that BMC waived the October 1987 delivery date, we treat the delivery date as if it were in effect in analyzing BMC's claim against Nesco. BMC's legal position was, and continues to be, that Barth was in default when Tomsich made the August 1988 promise. BMC is therefore bound by that characterization in its suit against Nesco.

27. If the parties created a new three-way contract, then Barth would have been released from liability for its breach because the parties would have intended the new contract to replace the original Contract. Although BMC would therefore be voluntarily relinquishing its claim against Barth, BMC might agree to do so as consideration for Nesco's assumption of liability under the second contract.

The parties could have created a new three-way contract without replacing the original Contract, and therefore without releasing Barth from liability. This option, however, is too implausible to be credible. Under this option, Barth would remain liable for its breach of the original Contract, but would still be obligated (together with Nesco this time) to complete the project under the new three-way contract. Particularly in light of the incessant technical problems that Barth experienced while trying to perform under the original Contract, it is highly unlikely that Barth and Nesco would assume the risk of becoming liable under a second contract, while Barth remained liable under the first. Barth and Nesco would have had nothing to gain from entering into a new contract unless BMC released Barth from liability under the original Contract.

tested adage: if it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.[28]

Because a guarantee to answer for the debt of another (including a debt past due) is void under Florida law unless in writing, Nesco's oral guarantee is unenforceable.[29] Consequently, BMC's claim against Nesco is barred.[30]

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28. The "duck test" has received wide support from the courts. See, e.g., Hurston v. Director, Office of Workers Compensation Programs, 989 F.2d 1547, 1549 (9th Cir.1993); Psarianos v. Kikis, 941 F.Supp. 79, 80 (E.D.Tex.1996); Loudermilk v. Loudermilk, 183 W.Va. 616, 397 S.E.2d 905, 907 (W.Va.1990).

29. Florida's statute of frauds provides:

> No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith. . . .

Fla. Stat. ch. 725.01 (1997).

30. We are not converting BMC's promissory estoppel claim into a contractual guarantee claim. Instead, we note that the essence of BMC's claim — regardless of the label affixed to it — is that Nesco promised to become liable for the debt of another (Barth), after that debt had already become due. If there had been adequate consideration, BMC would have labeled its claim a contractual "guarantee." In the absence of consideration, however, BMC has called its claim "promissory estoppel." Our point is this: a promise

(Cont'd)

Appendix A

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to become liable for the past-due debt of another is invalid unless in writing. The likelihood that someone would assume liability for an obligation that was already in default is too minute to permit such a promise to be enforced absent a writing to prove its existence.

Although we discuss Nesco's promise as if BMC labeled it a guarantee, our conclusion is equally sound if we instead apply promissory estoppel rules to BMC's claim. Promissory estoppel requires "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance"; such a promise is "binding if injustice can be avoided only by enforcement of the promise." W.R. Grace & Co. v. Geodata Servs., Inc., 547 So.2d 919, 924 (Fla.1989). The promisee must also show that such reliance was to its detriment. See Crown Life Ins. Co. v. McBride, 517 So.2d 660, 662 (Fla.1987).

BMC's claim fails under promissory estoppel rules because it was unreasonable for BMC to rely on Nesco's promise absent a writing. BMC claimed at trial that it suffered $6.4 million in damages because of Barth's default on its performance, and that Nesco assumed full liability for that performance after the default. Again, it is so unlikely that someone would assume liability for a past-due debt that it is unreasonable to rely on such a promise if it is not reduced to a writing; this principle is particularly true when the liability totals $6.4 million.

Alternatively, BMC's claim fails under promissory estoppel rules because BMC did not detrimentally rely on Nesco's promise. Although BMC delayed filing suit for nine months and payed Barth an additional $100,000 in reliance on Tomsich's promise, BMC has the right to collect these additional costs from Barth (in fact, BMC included these costs in its calculation of damages against Barth at trial). Consequently, BMC did not incur any detriment because of Nesco's promise.

BMC attempts to escape from the grasp of the statute of frauds by claiming that Nesco's promise was "direct" rather than "collateral." Under the statute of frauds, where the main purpose of the guarantor is to obtain some benefit or serve some interest of its own rather than to gain some advantage for the beneficiary, that promise is considered "direct," and remains beyond the reach of the statute. See Al Booth's, Inc. v. Boyd-Scarp Enters., Inc., 518 So.2d 422, 423-24 (Fla. 5th DCA 1988) (referring to this principle as the "leading object" rule). Consequently, if Nesco's main purpose in making the guarantee was to achieve some benefit for itself rather than for Barth, the statute of frauds would not apply, and BMC's claim would not be barred.

BMC's argument, however, ignores the fact that Nesco could not reasonably hope to gain any benefit for itself by guaranteeing Barth's overdue performance; because (according to BMC's legal position) Barth was already in default, and BMC never waived that default, BMC could have sued Barth and Nesco for breach immediately after Nesco made the guarantee. Nesco's only incentive to guarantee Barth's defaulted performance was the mere hope that BMC would refrain from filing suit if the equipment was delivered in the near future. This hope, however, does not constitute any reasonable expectation of benefit. Consequently, Nesco's guarantee was not "direct," and is governed by the statute of frauds.

Because the statute of frauds applies to Nesco's promise, BMC's claim against Nesco fails in the absence of a writing evidencing the guarantee. Consequently, we vacate the judgment against Nesco and remand the case to the district court with the instruction that it enter judgment for Nesco.

Appendix A

IV.

For the foregoing reasons, we hold that the district court erred in concluding that the UCC did not apply to the Contract. Furthermore, we conclude that BMC waived the October 1987 delivery date. We therefore VACATE the district court's judgment against Barth and REMAND the case to the district court for retrial of BMC's claims against Barth as well as Barth's counterclaims in accordance with the UCC. Furthermore, we hold that BMC's claim that Nesco guaranteed Barth's performance is void in the absence of any writing, because (according to BMC's legal position) Barth's obligation was already in default when the purported guarantee was made. Consequently, we VACATE the district court's judgment against Nesco and REMAND the case to the district court and instruct it to enter judgment for Nesco.

SO ORDERED.

APPENDIX B — OMNIBUS ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED AND FILED JULY 21, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-6443-CIV-MOORE

BMC INDUSTRIES, INC.,

Plaintiff

vs.

BARTH INDUSTRIES, INC., et al.,

Defendants.

OMNIBUS ORDER

THIS CAUSE came before the Court upon Defendant Barth's Motion for Summary Judgment as to Count I (liability),[1] Defendant Barth's Motion for Summary Judgment

1. The Court notes that Barth's Motion for Summary Judgment on Count I (liability) of the Counterclaim was filed on May 13, 1994 and is docketed as number 389. Barth's Motion for Summary Judgment of Count I of the Second Amended Complaint was filed the same day and is in the court file, but was not assigned a docket number. Both motions address the same essential principles regarding the breach of contract allegations in Count I of the Second Amended Complaint and Count I of the Counterclaim.

as to Count I (liability) of Counterclaim (DE #389), Defendant Barth's Motion for Summary Judgment as to Count II (DE #296), Defendant Nesco's Motion for Summary Judgment as to Count VIII (DE #328), Plaintiff BMC's Motion for Summary Judgment as to the Counterclaim (DE #363), Defendant Barth's Motion for Partial Summary Judgment as to Count I (damages) (DR #386), and Defendant BIC's Motion for Summary Judgment as to Counts VI, VII and VIII (DE #392).

THE COURT has considered the Motions, responses, supplements, and the pertinent portions of the record, and being otherwise fully advised in the premises, it enters the following Order.

BACKGROUND

In October 1986, Plaintiff BMC Industries, Inc. ("BMC")[2] contracted with Defendant Barth Industries, Inc. ("Barth") to design, construct and install equipment which would automatically produce plastic eyeglass lenses at BMC's Vision-Ease facility. A written agreement for $515,200 was consummated on October 29, 1986 calling for Barth to "design, fabricate, debugg/test and supervise field installation and start up of equipment to automate the

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2. In December 1988, Barth reorganized and became Barth Industries Co. Limited Partnership ("Barth LP"). Prior to the organization, Barth was a corporate entity existing as a wholly-owned subsidiary of Defendant Nesco Holdings, Inc. ("Nesco"). After the reorganization Barth LP was owned by Nesco, a limited partner with a 99 percent interest, and Defendant BIC Corporation, a general partner with a one percent interest.

operations of mold assembly declipping, clip transport, mold assembly clipping and mold filling."[3] The delivery of the first unit was scheduled for February 1987 and the fourth unit was due for delivery in June 1987. A "Revised Agreement" and then an "Amended Revised Agreement" pushed final delivery date of all four units back to October 1987.

Subsequent to the Amended Revised Agreement, there were various oral communications and representations between the parties. Although the Court will discuss the particular evidence when discussing each motion, the record demonstrates significant disagreement as to what promises were made. In sum, the relationship between the parties deteriorated and BMC filed the instant lawsuit in June 1989. Plaintiff's Second Amended Complaint alleges several causes of action, but on May 23, 1994 this Court granted Plaintiff's Motion for Voluntary Dismissal as to Counts III, IV, V, VI, VII, IX, X, XI, XII, XIII and XIV. Accordingly, only Counts I, II and VIII remain. Count I of the Second Amended Complaint states a claim for breach of contract, Count II alleges fraudulent misrepresentation, and Count VIII states claims for promissory and equitable estoppel against Nesco. Defendant Barth filed a counterclaim alleging breach of contract, anticipatory repudiation, quantum meruit, fraud, breach of good faith and promissory estoppel.

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3. The contract is in the form of a "Purchase Order" attached to the Second Amended Complaint as Exhibit A.

Appendix B

DISCUSSION

Standard on Motion for Summary Judgment

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It may be entered only where there is *no* genuine issue of material fact. Moreover, the moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970).

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608.

> All reasonable doubts about the facts should be resolved in favor of the non-movant. *Casey Enterprises Inc. v. Am. Hardware Mutual Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial.

[*Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981)]; *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co.*, 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. [*Impossible Electronics Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026,1031 (5th Cir. 1982)]; *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 160, 90 S. Ct. at 1609-10; *Marsh*, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). *See Dalke v. Upjohn Co.*, 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, 684 F.2d 1365, 1369 (11th Cir. 1982); *see Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

The non-moving party, however:

> [m]ay not rest upon the mere allegations and denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed.R.Civ.P. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Anderson*, 477 U.S. at 254, 106 S. Ct. at 2513. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. *Id.* at 254-55.

Additionally, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *Id.*

Defendant Barth's Motion for Summary Judgment as to Count I of Counterclaim (liability) (DE #389) and Defendant Barth's Motion for Summary Judgment as to Count I (liability)

A recurring issue raised by the parties is whether Article 2 of the Uniform Commercial Code ("UCC") applies to this case. In its Motion for Summary Judgment as to Count I (liability) of the Second Amended Complaint and Motion for Summary Judgment as to Count I of the Counterclaim (liability), Barth argues that the UCC applies to this case because it involves the sale of goods. As support, Barth relies largely on *KLT Industries, Inc. v. Eaton Corp.*, 505 F. Supp. 1072 (E.D. Mich. 1981) which applied the UCC to a similar factual situation. However, the Court notes that the *KLT* decision summarily states that the UCC applies but provides no rationale for such a conclusion. *KLT*, 505 F. Supp. at 1078.

In response, BMC claims that the UCC does not apply. BMC argues that although the contract at issue is a "hybrid" between goods and services, the Court should look to see whether the "predominant factor" is the rendition of services

or a transaction of sale with labor incidentally involved. *See, e.g., Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974); *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991). In applying the predominant factor test, BMC relies largely on *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977) in which the court examined a contract for the engineering, design and construction of machinery for use in a mill. The court in *Lincoln Pulp* found that the UCC did not apply and stated as follows:

> A contract which is predominantly for the rendition of services, even though it involves the furnishing of equipment, is not a "transaction in goods" and is therefore not governed by Article 2. The Lincoln-Dravo contract covers the "engineering and construction of a heat and chemical recovery unit." Dravo agreed "to furnish project management, process and design engineering, procurement, construction management, start-up assistance and materials as well as auxiliary equipment including evaporators and precipitators and construction of a chemical recovery boiler . . . ." The contract was for a fixed fee of $5.2 million, without any allocation of price breakdown between engineering or other services and material costs. The contract is a typical engineering-construction contract involving predominantly the rendition of services, not the sale of goods. As such, it falls outside the scope of Article 2.

Lincoln Paper, 436 F. Supp. at 275 (citations omitted). BMC correctly points out the similarities between the facts

described in *Lincoln Paper* and the facts of the instant case. The contract at issue here was initially for a fixed fee with no allocation between the costs of services and materials. The contract also called for design, manufacturing, testing and construction of equipment. This Court finds that there is no genuine issue of material facts concerning the predominant factor of this contract. The agreement primarily called for Barth to provide services rather than goods. As a result, the contract is not governed by Article 2 of the UCC. *See, e.g.*, *Lincoln Paper*, 436 F. Supp. at 275; *Allied Industrial Serv. Corp. v. Kasle Iron & Metals, Inc.*, 405 N.E.2d 307 (Ohio 6th Ct. App. 1977); *Mingledorf's Inc. v. Hicks*, 209 S.E.2d 661 (Ga. App. 1974).

Because these Motions were predicated on the UCC, which does not apply, the Court denies these Motions for Summary Judgment.

Defendants' Motion for Summary Judgment as to Count II (DE #296)[4]

1. Economic Loss Rule

Defendant Barth claims that it is entitled to Summary Judgment as to Count II of the Second Amended Complaint, a claim for fraudulent misrepresentation. Barth first claims that Florida's economic loss rule bars Count II. In *AFM Corp. v. Southern Bell Tel. & Tel.*, 535 So.2d 180 (Fla. 1987) and *Florida Power and Light Co. v. Westinghouse Electric Corp.*,

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4. This Motion is directed to Counts II and III, but as stated previously Plaintiff voluntarily dismissed Count III.

510 So.2d 899 (Fla. 1987), the Florida Supreme Court held that a party to a contract may not pursue a claim in tort for purely economic losses, absent a claim for personal injury or damage to property other than the defective property itself. *See Interstate Sec. Corp. v. Hayes Corp.*, 920 F.2d 769, 773 (11th Cir.), *reh'g denied*, 929 F.2d 704 (11th Cir. 1991) (en banc). Under this rule, an action in tort is inappropriate where the claim is based on breach of contract. *See Interfase Marketing, Inc. v. Pioneer Technologies Group, Inc.*, 774 F. Supp. 1355, 1358 (M.D. Fla. 1991). The "economic loss" doctrine has been invoked to preclude actions based on fraud and breach of fiduciary duty where there is a failure to allege or prove personal injury or property damage in litigation arising out of contractual relationships. *See, e.g., Hayes*, 920 F.2d at 776-77; *Kee v. Nat'l Reserve Life Ins. Co.*, 918 F.2d 1538, 1543-44 (11th Cir. 1990).

However, when an alleged fraud is completed prior to the formation of the contract, it can be characterized as "independent" of the contract and an action for the fraudulent inducement is not barred by the economic loss rule. *Brass v. NCR Corp.*, 826 F. Supp. 1427, 1428 (S.D. Fla. 1993); *Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1238 (N.D. Fla. 1991) (finding that the economic loss rule applies to "fraud in the performance" claims, but distinguishing fraud in the inducement). A permissible fraudulent inducement action exists when "one party tricked the other into contracting." *Leisure Founders, Inc. v. CUC Int'l, Inc.*, 833 F. Supp. 1562, 1572 (S.D. Fla. 1993); *Williams*, 772 F. Supp. at 1238.

In essence, Plaintiff BMC is alleging that it was tricked into contracting with Barth due to various misrepresentations.

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The January 14, 1994 affidavit of Joseph Peralta, senior designer at Vision-Ease, states that he recommended that BMC enter into the contract with Barth based on the statements of Frank Bailey and other Barth representatives who described Barth as an experienced designer, manufacturer and installer of automation equipment.[5] The exhibits attached to the Peralta affidavit, which consist of Barth brochures and presentations, also contain references to the design ability of Barth. In reply, Barth points to portions of the exhibits which indicate that Barth did not engage in design. Barth also directs the Court to Peralta's deposition in which he was asked if he could say that there was "anything inaccurate in the sales literature" supplied by Barth employees; he answered that he could not.

Because BMC has stated a claim for fraudulent inducement, and because there remain issue of fact as to what representations were made, this Court cannot dismiss Count II based on the economic loss doctrine.

2. Justifiable Reliance

Defendant Barth also claims that it is entitled to summary judgment on Count II, arguing that BMC did not justifiably rely on a misrepresentation.[6] A claim of fraud in the inducement requires that Plaintiff establish the following elements: 1) that the Defendants misrepresented a material

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5. *See* Affidavit of Joseph Peralta ¶¶ 6-8, 12.

6. For the purpose of this Motion, Barth assumes that it made some statement which misrepresented a material fact.

fact; 2) that the Defendants knew or should have known that the statement was false; 3) that the Defendants intended that the representation would induce the Plaintiff to act; and 4) that the Plaintiff was injured by acting in justifiable reliance on the misrepresentations. *Golden v. Mobil Oil Corp.*, 882 F.2d 490, 494 (11th Cir. 1989); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir. 1983); *Johnson v. Davis*, 480 So.2d 625, 627 (Fla. 1985).

Barth requests summary judgment on Count II and argues that even if there were misrepresentations during negotiations, BMC did not justifiably rely on them because there was a subsequent written agreement. Defendant argues that any oral representations made by parties during negotiations are immune because it is the written agreement that will govern the parties' rights and responsibilities. Defendant relies on *Schubot v. McDonalds Corp.*, 757 F. Supp. 1351 (S.D. Fla. 1990), *aff'd without op.*, 963 F.2d 385 (11th Cir. 1992). In response, Plaintiff correctly points out that in *Schubot* the district court relied on a disclaimer contained in the contract that specifically precluded reliance on additional oral or written agreements. *See Schubot*, 757 F. Supp. at 1354-56. In addition, the Court notes that parol evidence may be used to prove fraudulent inducement. *See Gregg v. United States Industries, Inc.*, 715 F.2d 1522 (11th Cir.), *reh'g granted, in part, clarified on other grounds*, 721 F.2d 345 (11th Cir. 1983), *cert. denied*, 466 U.S. 960, 104 S. Ct. 2173, 80 L. Ed. 2d 556 (1984).

Barth also alleges that any future promises or "puffing" cannot be the basis for a fraud action. Barth cites various cases and the *Restatement (Second) of Torts* for the

proposition that an action for fraud cannot exist if the party intends to carry out the promise when made but later changes his mind.

In response, BMC alleges that Barth made misrepresentations as to Barth's prior experience and capabilities.[7] BMC states that these representations go beyond a promise of future action and can be the basis for a fraud action:

> Trade talk or puffing relates to matters of opinion, whereas a representation regarding experience consists of a statement of past or existing fact. A misrepresentation as to extent of past experience can be a foundation for an action for fraud, especially as there is no duty to investigate its truth or falsity unless the recipient knows of its falsity . . .

See Eastern Cement v. Halliburton Co., 600 So.2d 469, 471 (Fla. 4th Dist. Ct. App.), *rev. denied*, 613 So.2d 4 (Fla. 1992). Because there is a genuine issue of material fact as to whether BMC relied on various representations in selecting Barth to provide the services at issue in this case, the Court cannot grant summary judgment on Count II.

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7. *See* Second Amended Complaint; Affidavit of Joseph Peralta ¶ 14, BMC's Response to Barth's Motion for Summary Judgment (DE #324), Exhibit A; Deposition of Carl Bergmann, at 225-28, BMC's Response to Barth's Motion for Summary Judgment (DE #324), Exhibit B.

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Defendant Nesco's Motion for Summary Judgment as to Count VIII (DE #328)

By way of summary, some of the facts surrounding Count VIII of the Second Amended Complaint, a claim for equitable and promissory estoppel against Nesco, can be found in paragraph 43 of the Second Amended Complaint where Plaintiff BMC alleges the following:

> From January 1989 and continuing thereafter, Robert J. Tomsich ("Tomsich"), personally and in his capacity as President of Nesco Holdings/Old Nesco, made representations and commitments to BMC that Nesco Holdings/Old Nesco would supervise completion of the project and would ensure that performance would occur according to schedule.

Count VIII then alleges that BMC relied on these representations and incurred additional obligations, including paying an additional $100,000 that was not yet due.[8] BMC claims that it delayed declaring Barth in default of the agreement based on Nesco's representations and promises to supervise the completion of the project. BMC alleges that Nesco should be estopped from denying liability for Barth's actions because Barth, as a subsidiary of Nesco, retained the benefits of the $100,000.

In its Motion for Summary Judgment on Count VIII, Nesco raises five arguments. First, Nesco alleges that under

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8. *See* Second Amended Complaint ¶¶ 113-19.

agency theory, Tomsich was speaking for Barth and no one else. Second, Nesco argues the Florida statute of frauds bars Count VIII. Third, Nesco argues that promissory estoppel cannot overcome Nesco's statute of frauds defense. Fourth, Nesco argues that any alleged oral promises it made are not sufficiently definite to warrant the invocation of promissory estoppel. Finally, Nesco argues that if BMC's argument is correct, then a novation has taken place substituting Nesco for Barth.

a. Agency

Nesco argues that Tomsich and Nesco acted as agents of Barth, rather than as an agent for itself, during the time period relevant to this case. Accordingly, Nesco argues that it was an agent acting for a disclosed principal and is not liable for the debts of the principal. In response, BMC points to several portions of the record which create an issue of fact as to whether Nesco was acting for itself or others. For example, Peter H. Trembath, who was BMC's vice-president, secretary and general counsel, testified that Tomsich introduced himself as the CEO of Nesco in August 1988 and assured the parties that Nesco would take an active role in the project.[9] Joseph Mandia, a Nesco employee, testified that in December 1988 Tomsich designated Mandia as the new "project manager" and made him responsible for "[o]verall coordination of the project."[10] Due to the disputed issues of fact, the Court cannot enter summary judgment on this ground.

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9. *See* June 17, 1991 Deposition of Peter H. Trembath, at 134-39.

10. *See* January 18, 1991 Deposition of Joseph L. Mandia, at 113-14.

b. Statute of Frauds

Nesco also argues that BMC's claim is barred by Florida's statute of frauds because it is based on an alleged oral agreement. Florida law provides, in pertinent part, as follows:

> No action shall be brought . . . to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged . . . .

Fla. Stat. § 725.01. Nesco argues that under the statute of frauds, any purported promise that it made to undertake performance or liability for Barth cannot be the basis of a cause of action.

In response, Plaintiff BMC argues that the promise at issue is a "direct" promise to perform not barred by the statute of frauds, as opposed to a "collateral" promise that may not be enforced unless in a writing. Plaintiff cites two cases: *Polera v. General Window Corp.*, 132 So.2d 778 (Fla. 2d Dist. Ct. App. 1961) and *Sanders v. Hodges*, 147 So. 571 (Fla. 1933). These cases support the proposition that a direct promise to perform is not within the statute of frauds while a collateral promise to perform only in the event of a default by another must be in writing. In addition, the question of whether a promise is direct or collateral is a question of fact to be determined by the jury. *Sanders*, 147 So. at 572; *see*

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Hilkmeyer v. Latin American Air Cargo Expediters, Inc. 94 So.2d 821, 826 (Fla. 1957).

Plaintiff also cites Section 366 of *Corbin on Contracts* which states that "when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute [of frauds]." In addition, the 1993 Supplement states as follows: "When one who is allegedly an oral guarantor of an obligation may reasonably be seen to possess a collateral interest involving pecuniary or other gain from the underlying transaction out of which the guaranteed obligation arose, the guaranty is enforceable without reference to the applicable statute of frauds." Plaintiff cites *Al Booth's, Inc. v. Boyd-Scarp Enters., Inc.*, 518 So.2d 422 (Fla. 5th Dist. Ct. App. 1988) for the proposition that under Corbin's "leading object" rule and the *Restatement (Second) of Contracts*, an oral promise is not subject to the statute of frauds when the promisor's main purpose in making the promise was to advance his own interests and when the promisor received a substantial benefit as a result. BMC adds that the benefit need not go directly to the promisor as long as the consideration is paid to an entity in which the promisor has a financial interest. *See In re Alchar Hardware Co.*, 764 F.2d 1530 (11th Cir. 1985).

The Court finds that a determination of whether Nesco's promise was "direct" or "collateral" is an issue for resolution by the jury and denies the motion for summary judgment on this ground.

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c. Promissory Estoppel

Defendant Nesco then argues that promissory estoppel does not support an agreement which violates the statute of frauds. However, as stated above, the Court finds that there remains an issue of fact as to whether the statute of frauds applies to the promises alleged in this case. Promissory estoppel can be applied to enforce oral promises which are not covered by the statute of frauds when it is necessary to prevent injustice, if the promisor makes affirmative representations which he reasonably should expect would induce the promisee into substantial action or forbearance and if there was detrimental reliance. *W.R. Grace & Co. v. Geodata Servs., Inc.*, 547 So.2d 919 (Fla. 1989). Accordingly, the issue of promissory estoppel need not be addressed until a determination is first made as to whether the promise at issue violates the statute of frauds.

d. Definiteness

Nesco then argues that BMC has failed to demonstrate any "definite" promise that can justify the invocation of promissory estoppel. However, the Court finds that there is ample evidence to support the existence of a definite promise.[11] Accordingly, the Court denies the Motion for Summary Judgment based on definiteness.

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11. *See, e.g.*, BMC's Response to Nesco's Motion for Summary Judgment, Exhibit D; Deposition of Joseph Mandia, at 176-77.

e. Novation

Nesco's final argument is that if BMC's argument is correct, then a novation has taken place substituting Nesco for Barth — i.e., "if Nesco is in, Barth is out." In support of its argument, Nesco provides no caselaw and cites only Sections 278 and 279 of the *Restatement (Second) of Contracts*. Section 278 states, in part, that "[i]f an obligee accepts in satisfaction of the obligor's duty a performance offer by a third party, the duty is discharged." Section 279 states, in pertinent part, that "[a] substituted contract is a contract that itself is accepted by the obligee in satisfaction of the obligor's existing duty" and that such a contract "discharges the original duty."

However, there is nothing in the record to support Nesco's argument that any alleged promise to perform by Nesco was accepted "in satisfaction" of performance by Barth. Accordingly, the Motion for Summary Judgment on this ground is denied.

Plaintiff BMC's Motion for Summary Judgment as to Defendant's Counterclaim (DE #363)

As stated earlier, Barth has brought a counterclaim alleging breach of contract, anticipatory repudiation, quantum meruit, fraud, breach of good faith and promissory estoppel. In sum, Barth claims that there were a series of modifications to the parties' original agreement that essentially rewrote the initial agreement. In addition, Barth argues that BMC misrepresented its ability to produce the lenses by the non-automated procedure it had been using. Barth also claims

that BMC has repudiated the modified agreement between the parties. BMC moves for summary judgment for each of the counterclaims.

a. Breach of Contract

BMC claims that Barth's counterclaim for breach of contract must fail because it is based on oral modifications of the written purchase order. BMC argues that any alleged oral modifications of the parties written agreement were not valid because the purchase order agreement provided that "no modification of this order or of these conditions shall be binding an the Buyer [BMC] unless made in writing and signed by its duly authorized representative." When a contract requires an additions or changes to be in writing, oral modifications are not enforceable. *See Acquisition Corp. of America v. American Cast Iron Pipe Co.*, 543 So.2d 878 (Fla. 4th Dist. Ct. App. 1989).

In response, Barth relies almost entirely on the Uniform Commercial Code. However, as discussed above the UCC does not apply to this contract. Accordingly, BMC's Motion for Summary Judgment on Count I of the Counterclaim is granted.

b. Anticipatory Repudiation

BMC claims Barth's counterclaim for anticipatory repudiation cannot remain because such a cause of action requires an absolute refusal to perform by one party during the performance by another party. *See Pallardy-Watrous Ins. Agency, Inc. v. M. Tucker, Inc.*, 163 So. 284 (Fla. 1935). In

addition, BMC argues that Barth is barred from asserting the counterclaim because Barth was not capable of performing its own obligations under the contract. BMC cites *Hospital Mortgage Group v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla. 1982) and *Restatement (Second) of Contracts* § 254, for the proposition that a party claiming anticipatory repudiation must itself be able to perform.

In response, Barth argues that *Hospital Mortgage* does not apply because it is a non-UCC case. However, as stated above, the UCC does not apply. In the alternative, Barth argues that it met the requirement that it tender its own performance when Barth wrote a May 21, 1989 letter which offered delivery of part of the automated system. There appears to be a genuine issue of material fact at to whether there was an anticipatory repudiation and whether Barth was able to perform at the time. Accordingly, summary judgment on this Counterclaim must be denied.

c. Quantum Meruit

BMC requests summary judgment on the counterclaim for quantum meruit and argues that such an action cannot be brought when an express contract exists. Curiously, one of the cases Barth cites is *Quayside Assocs., Ltd. v. Triefler*, 506 So.2d 6 (Fla. 3d Dist. Ct. App. 1987). In *Quayside*, the court found that the law does not apply to an implied contract when an express contract exists. However, the court did find that a jury may consider both an express and implied contract, finding that one of the two exists. Such a result is consistent with the rule that a party may plead inconsistent claims and theories. *Brookhaven Landscape & Grading Co. v. J.F.*

Barton Contracting Co., 676 F.2d 516, 523 (11th Cir. 1982); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781, 790 (5th Cir. 1973). In addition, the Court has granted summary judgment to BMC on the breach of contract counterclaim which therefore leaves open the possibility for recovery based on quantum meruit. Accordingly, summary judgment is inappropriate on this counterclaim.

d. Fraud

BMC first argues that the counterclaim for fraud is barred by Florida's economic loss rule. However, as discussed above, fraudulent inducement claims are not barred. *Brass v. NCR Corp.*, 826 F. Supp. 1427, 1428 (S.D. Fla. 1993); *Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1237-38 (N.D. Fla. 1991); *Leisure Founders, Inc. v. CUC Int'l, Inc.*, 833 F. Supp. 1562, 1572 (S.D. Fla. 1993); *Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1238 (N.D. Fla. 1991). Barth correctly points to paragraph 224 of the counterclaim which states that Barth was "induced by those several false representation" and that it "entered into an agreement which it would either not have entered into or would have demanded different terms, had it known the truth." Barth supports this counterclaim with the deposition testimony of former BMC employee Errol Hunger. Accordingly, Barth has demonstrated a genuine issue of material fact on its claim for fraudulent inducement and the court cannot grant summary judgment based on the economic loss rule.

BMC also argues that it is entitled to judgment on Barth's fraud counterclaim because Barth has failed to meet the

elements of fraud. As stated above, fraud requires 1) a false statement concerning a material fact, 2) the representor's knowledge that the statement was false, 3) intent to induce another to act and 4) injury caused by justified reliance. *Golden v. Mobil Oil Corp.*, 882 F.2d 490, 494 (11th Cir. 1989); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir. 1983); *Johnson v. Davis*, 480 So.2d 625, 627 (Fla. 1985). BMC claims there is no evidence of a false statement or justifiable reliance. However, the Court finds there is a genuine issue of material fact as to whether BMC engaged in fraud. For example, Barth has presented the Hunger deposition which alleges that BMC withheld certain information about the complexity of the manufacturing process at issue and the number of molds to be processed by the equipment. Barth alleges that they relied on the representations of BMC when entering into this contract and later discovered that it was far more complicated than had been represented. Accordingly, the Court cannot grant summary judgment on the fraud counterclaim.

e. Breach of Good Faith

BMC argues that the counterclaim for breach of good faith cannot remain because such a claim is not a separate theory of recovery when there is also an action for breach of a contract. BMC relies on *Burger King Corp. v. Austin*, 805 F. Supp. 1007 (S.D. Fla. 1992). However, that case indicates that an action for breach of good faith may stand as a separate theory depending on whether there is an allegation that a party exercised its discretion under the contract reasonably and not arbitrarily or capriciously. *Compare id.* at 1014 (allowing an action for breach of good faith) *with id.* at 1015 (finding that

action for breach of good faith was part of breach of contract claim). Because an action for breach of good faith can remain as a separate count, and also because the Court has found that summary judgment in BMC's favor is appropriate on Barth's breach of contract counterclaim, BMC's motion for summary judgment is denied as to the breach of good faith counterclaim.

f. Estoppel

BMC claims that it is entitled to summary judgment on Barth's estoppel counterclaim.[12] This counterclaim alleges that Robert Carlson, President of BMC "promised that BMC would compensate Barth for its commitment of resources and money in excess of the contract price, in an amount to be fairly negotiated, when a working module was operational."[13]

BMC claims that the requirements for promissory estoppel are lacking. First, BMC claims that there was no injustice to Barth. Second, BMC argues that there was no definite promise. Finally, BMC alleges that Barth has "unclean hands" and is barred from asserting an equitable estoppel claim.

Barth's entire response states as follows:

> BMC's promissory estoppel argument borrows the authorities urged by Barth in its pending Motion

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12. The claim for estoppel is labeled as Count VII, but this appears to be a typographical error because it is the sixth counterclaim.

13. *See* Counterclaim ¶ 233.

> for Summary Judgment as to Count VIII, BMC's claim for promissory estoppel. Due to space limitations, Barth respectfully asks the Court to note Barth's legal argument on the promissory estoppel issue, as set forth in its earlier Motion. Responding to the factual assertions, BMC claims that ". . . Carlson's alleged promise [to pay more money to Barth], *even if made,* was indefinite . . ." (emphasis supplied; BMC Mem. at 19). Therefore, says BMC, there was no "definite" promise. This argument is tantamount to saying that equity provides no remedy when a promisor says, in essence, "Keep working and I will pay you what you are worth, later on, if I feel like it" (*see* discussion *supra*, regarding open price term under UCC.) The "injustice" of allowing Carlson and BMC to get away with this bad faith ploy is that Barth is "suckered" into relying on a man's word, only to discover that he had his fingers crossed. Barth contributed far more time and money to this project than anticipated at the outset, and succeeded (apparently) even beyond BMC's wildest dreams. It is the clearest form of injustice for BMC now to say, "Tough — I didn't mean it."

Barth's Response to BMC's Motion for Summary Judgment as to Barth's Counterclaim, at 19-20. The Court notes that Barth's response makes no references to caselaw or the record. In addition, the "earlier Motion" regarding Count VIII mentioned in the response was not filed by Defendant Barth but was filed by the same attorneys on behalf of Defendant Nesco. Based on an independent review of the record, the

Court finds that there are issues of fact as to the possible injustice to Barth because there is evidence that both parties continued their business relationship based on various representations. However, BMC correctly relies on *W.R. Grace & Co. v. Geodata Servs., Inc.*, 547 So.2d 919 (Fla. 1989), a case discussed above. Under *W.R. Grace*, BMC's promise that it "would compensate Barth for its commitment of resources and money in excess of the contrary price, in an amount to be fairly negotiated, when a working module was operational" is not sufficiently definite to support a claim for promissory estoppel. Accordingly, summary judgment is granted on that counterclaim.

Barth's Motion for Partial Summary Judgment as to Count I (damages) (DE #386)

Barth moves for summary judgment on the issue of damages and argues that BMC's claim for $16,711,942 is not proper because the original contract was only for $515,200. According to the deposition of William O'Connell, BMC's damages expert, Plaintiff is seeking to recover damages for lost profits, lost labor savings, and the effect of the alleged breach on BMC's working capital.[14]

Barth first argues that the lost profits demand suffers from two flaws: that it is based on the production of six machines

14. The Court notes that Barth relies on the UCC. As stated previously, the Court finds that the UCC does not apply to the contract at issue in this case. However, BMC correctly states that the recovery under Florida contract law and the UCC appear to be "materially the same." *See* BMC's Memorandum of Law in Opposition to Barth Industries, Inc.'s Motion for Partial Summary Judgment (Damages) on Count I, at 6 n.10.

although the contract only called for the production of four and that BMC's claim for the potential sales from the potential production from two additional machines is too speculative and uncertain. Barth then argues that the claim for lost labor savings must fail because BMC had no plans to terminate any of the employees whose jobs would be handled by the automation equipment. Barth next argues that working capital is not a recoverable element of damages. Finally, Barth argues that the delivery date was modified, and that damages never accrued because they do not begin running until a reasonable notice of default.

a. General Standard

Under basic contract law, an injured party has a right to recover all consequential damages caused by a breach — damages which were reasonably within the contemplation of the parties at the time of the making of the contract. *Hobbley v. Sears, Roebuck & Co.*, 450 So.2d 332 (Fla. 1st Dist. Ct. App. 1984); *Life Investors Ins. Co. of America v. Johnson*, 422 So.2d 32 (Fla. 4th Dist. Ct. App. 1982). Damages are recoverable only if they were actually in the contemplation of the parties or if the parties had reason to foresee them. *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 267 So.2d 853 (Fla. 4th Dist. Ct. App. 1972); *Hobbley*, 450 So.2d at 333; *Restatement (Second) of Contracts* § 351 (stating that test is an objective one by which looks to whether a reasonable person would have foreseen the damages caused by the breach).

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b. Lost Profits

Barth raises arguments about two aspects of the lost profits claim: the number of units and the calculation of potential sales. The original contract at issue called for the production of four machines, but BMC's damage witness has calculated the amount based on the production of six machines. In response, BMC claims that Barth knew about BMC's plans to add two more machines in the future. The Court is also mindful of the Florida Supreme Court's decision in *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1351 (Fla. 1989) which states that lost profits are recoverable if there is "some standard by which the amount of damages may be adequately determined." However, it is undisputed that there was no contract to manufacture the additional machines. There can be no recovery for lost profit when there is no contractual obligation to supply the items at issue. *See Navistar Int'l Corp. v. Hagie Manufacturing Co.*, 662 F. Supp. 1207, 1214 (N.D. Ill. 1987); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1546-48 (5th Cir. 1984). Therefore, any damage calculations must be limited to those caused by failure to provide four machines and not six machines. However, summary judgment cannot be entered because there remain issues of fact for the jury as to the amount of such damages. Similarly, BMC may not recover damages for potential sales resulting from six machines, but may demonstrate entitlement to damages from the four machines described in the contract. Determination of these damages is also appropriate for the jury.

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c. Lost Labor Savings

Barth argues that the lost labor savings are not recoverable because BMC was not going to fire the employees whose work would be automated. Barth points to the testimony and notes of O'Connell, David Schwantes (Vision-Ease's president at the time), and Joseph Zaborny (vice-president of manufacturing and Vision-Ease plant manager). BMC argues that damages for lost labor savings are recoverable because Barth had reason to foresee and had actual knowledge of such damages. BMC points to the first page of the contract itself which states that automation process would "result[] in replacement of manual labor." BMC also directs the Court to the notes of its representative and the deposition testimony of O'Connell who stated that any employees displaced by the automation would either leave the company or be placed in already existing positions.

Based on this conflicting evidence, the Court finds that there is a genuine issue of material fact as to the recoverability of lost labor savings. Such a finding precludes an entry of summary judgment on this point.

d. Working Capital

Part of BMC's damage claim is for the effect of the alleged breach of contract on BMC's working capital. Plaintiff's damage expert, describes this request for recovery as follows:

> The working capital component is a calculation which measures the damages associated with

> either the loss of working capital measured by the investment and the assets which were not utilized, the loss of working capital for not being able to achieve labor savings or the damage caused by the loss of working capital due to lost sales, which is principally measured as the resulting cash flow from those three calculations times an interest rate.[15]

O'Connell also described it another way:

> [T]he working capital component is in fact measured by the incremental borrowing measured by the short-term interest borrowing rate, those amounts having been paid out of pocket. . . . Because the lost labor savings were not materialized, and the amounts were in fact actually paid to the employees, that cash outlay was financed through short-term lending, and the incremental cost associated with short-term lending to pay those employees was an out of pocket expense which is a component of the damage calculation.[16]

Barth argues that this is not recoverable as a matter of law and is really an attempt at double recovery of the prejudgment interest. Based on the written pleadings it is not entirely clear whether BMC is merely seeking prejudgment interest or

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15. *See* O'Connell Deposition, at 43-44.

16. *See* O'Connell Deposition, at 199-201.

something else. In addition, there appears to be no relevant caselaw in Florida or from the Eleventh Circuit. Moreover, the parties direct the Court to conflicting precedent from other jurisdictions. *Compare Atlas Concrete Pipe, Inc. v. Roger J. Au. & Son, Inc.*, 467 F. Supp. 830 (E.D. Mich. 1979), *rev'd on other grounds*, 668 F.2d 905 (6th Cir. 1982) *and Minpeco, S.A. v. Hunt*, 686 F. Supp. 427 (S.D.N.Y. 1988) *with Lewis v. Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971) *and Parmet Homes, Inc. v. Republic Ins. Co.*, 314 N.W.2d 453, 457-58 (Mich. 1981). Because of the uncertainty as to what comprises this aspect of the requested damages, there remain issues of fact precluding an entry of summary judgment. However, this denial is without prejudice and the parties are free to reargue this issue prior to trial.

e. Delivery Date

Finally, Barth argues that the delivery date "starts the ticking of the damage clock" and that the delivery date in this case was modified to a "reasonable" time. Barth relies on the UCC for this argument. However, as stated above, the UCC does not apply to this contract. Therefore, the motion for summary judgment is denied on this point.

Defendant BIC's Motion for Summary Judgment as to Count VIII (DE #392)[17]

As stated above, Barth Industries underwent a reorganization in December 1988. After the restructuring,

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17. This Motion was directed at Counts VI, VII and VIII, but as stated above only Count VIII remains.

Barth LP became a limited partnership. Nesco, Inc. (which later changed its name to Nesco Holdings) became the limited partner of Barth LP. In addition, BIC Corporation was formed and became the general partner of Barth LP. As a general partner, BIC can be liable for certain partnership liabilities. BIC claims that under Section 1515 of the Uniform Partnership Act, partners are jointly and severally liable for tort claims but only jointly liable for other obligations such as breach of contract judgments. As a result, BIC argues that it is liable for the fraud claim but that BMC will not be able to execute against BIC until all of the partnership assets are gone. In addition, if BMC obtains judgment only on the contract claim, BIC claims it would be entitled to dismissal. BIC argues that BMC could seek to collect from BIC only if collection from Barth LP were not successful. BIC moves for summary judgment.

In response, BMC concedes that BIC is named in the ad damnum clause in Count VIII but that no cause of action is stated against BIC in Count VIII. Because BMC agrees to strike BIC from the ad damnum clause, the Motion for Summary Judgment is denied as moot as to Count VIII.[18]

The motion at issue does not move for judgment on Counts I and II, but both BMC and BIC engage in a discussion as to whether BIC should remain a party to this action. The parties agree that if BMC obtains a judgment, it must first look to Barth LP before seeking the assets of BIC. Although

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18. *See* BMC Industries, Inc.'s Memorandum of Law In Opposition to BIC Corp.'s Motion for Summary Judgment as to Counts VI, VII and VIII, at 3 n.1.

BIC is not named in Counts I and II, it remains a defendant. Because the issue of the availability of collection against BIC is premature and need not be determined unless and until BMC obtains a judgment against Barth LP, the Court declines to dismiss BIC as a party in this action at this time.

CONCLUSION

In accordance with the above, it is

ORDERED AND ADJUDGED that Defendant Barth's Motion for Summary Judgment as to Count I (liability) and Defendant Barth's Motion for Summary Judgment as to Count I (liability) of Counterclaim (DE #389) are DENIED.

FURTHER ORDERED that Defendant's Motion for Summary Judgment as to Count II (DE #296) is DENIED.

FURTHER ORDERED that Defendant Nesco's Motion for Summary Judgment as to Count VIII (DE #328) is DENIED.

FURTHER ORDERED that Plaintiff BMC's Motion for Summary Judgment as to the Counterclaim (DE #363) is GRANTED IN PART AND DENIED IN PART. The Motion is DENIED as to the quantum meruit, anticipatory repudiation, fraud, and breach of good faith counterclaims and GRANTED as to the breach of contract and promissory estoppel counterclaims.

FURTHER ORDERED that Defendant Barth's Motion for Partial Summary Judgment as to Count I (damages) (DE #386) is DENIED.

Appendix B

FURTHER ORDERED that Defendant BIC's Motion for Summary Judgment as to Count VIII (DE #392) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of July, 1994.

s/ K.M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — VERDICT FORM DATED AND FILED JANUARY 31, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-6443-CIV-MOORE

BMC INDUSTRIES, INC.,

Plaintiff,

vs.

BARTH INDUSTRIES, INC., et al.,

Defendants.

VERDICT FORM

We, the Jury, return the following verdict:

BMC'S CLAIMS AGAINST BARTH AND NESCO

Question 1 is closely related to question 5: you must answer "yes" to only **one** of questions 1 and 5 and must answer "no" to the **other** of these two questions.

1. Did Barth breach its contract with BMC?

Yes ✓

No ___

Appendix C

If your answer to question 1 is "no," skip questions 2 through 4 and proceed directly to question 5. If your answer to question 1 is "yes," proceed to answer question 2.

2. What is the total amount of damages suffered by BMC as a result of Barth's conduct?

   $ 3,001,879.00

   Proceed to answer question 3.

3. Is Nesco liable to BMC on the basis of promissory estoppel?

   Yes ✓

   No ___

If your answer to question 3 is "no," then skip question 4 and proceed directly to question 5. If your answer to question 3 is "yes," then proceed to answer question 4.

4. What is the total amount of damages suffered by BMC as a result of Nesco's conduct?

   $ 2,137,453.00

Proceed to answer question 5. If your answer to question 1 is "yes," then you must answer question 5 "no." If your answer to question 1 is "no," then you must answer question 5 "yes."

Appendix C

BARTH'S CLAIMS AGAINST BMC

5. Did BMC commit an anticipatory repudiation of its contract with Barth?

Yes ___

No ✓

Proceed to answer question 6.

6. Is BMC liable to Barth for *quantum meruit*?

Yes ___

No ✓

Proceed to answer question 7.

7. Did BMC violate its duty to Barth to act in good faith and with fair dealing?

Yes ___

No ✓

If your answer to *all* of questions 5, 6 and 7 is "no," skip question 8 and proceed to the end of this verdict form. If you answered *any* of questions 5, 6 and 7 "yes," then proceed to answer question 8.

* * *

Appendix C

You have completed the jury verdict form. Please sign and date the form and do not answer any additional questions.

SO SAY WE ALL THIS 31 **DAY OF** January, **1995.**

s/ Flavio J. Escobar
FOREPERSON
Flavio J. Escobar

1/31/95 1:40 pm

We the Jury in explaining the damages suffered by BMC would like to clarify and state that question #2 and #4 are seperate amounts. The total amount of damages suffered by BMC as a result of *Barth's* conduct is respectively $3,001,879.00 and the total amount of damages suffered by BMC as a result of *Nesco's* conduct is respectively $2,137,453.00.

s/ Flavio J. Escobar
Foreperson

APPENDIX D — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED AND FILED MARCH 29, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 89-6443-CIV-MOORE

BMC INDUSTRIES, INC.,

Plaintiff,

vs.

BARTH INDUSTRIES, INC., et al.,

Defendants.

AMENDED FINAL JUDGMENT[1]

THIS CAUSE cane before this Court for jury trial. The issues having been tried and the jury having returned its verdict, the Court

ORDERS AND ADJUDGES that Final Judgment is entered in favor of Plaintiff and against Defendant Barth Industries, Inc. in the amount of $3,001,879.00, and against Defendant Nesco Holdings, in the separate amount of

1. This Amended Final Judgment supersedes the prior final judgment entered in this proceeding.

$2,137,453.00. This Court shall retain jurisdiction to consider any motions for costs or attorneys' fees, to the extent that such are recoverable.

Let execution issue.

DONE AND ORDERED in Chambers in Miami, Florida on the 29th day of March, 1995.

s/ K.M. Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 30, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-5137, 95-5338

BMC INDUSTRIES, INC.,

Plaintiff-Appellee,

versus

BARTH INDUSTIES, INC.,NESCO, INC.,
f.k.a. Nesco Management, Inc., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix E

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 23 1999
OFFICE OF THE CLERK

No. 98-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BMC INDUSTRIES, INC.,

Petitioner,

v.

BARTH INDUSTRIES, INC., Nesco, Inc., f/k/a Nesco Management, Inc., Barth Industries Co. Limited Partnership, BIC Corporation, Nesco Holdings, Inc., f/k/a Nesco, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BARTH INDUSTRIES, INC.

ARTHUR J. ENGLAND, JR.
Counsel of Record
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LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF EACH OF THE CORPORATE FILERS PURSUANT TO SUPREME COURT RULE 29.6

Barth Industries, Inc. ("Barth"), is the only corporate respondent in this proceeding.[1] Barth was reorganized, subsequent to the inception of this litigation in 1989, and is now known as Barth Industries Co., L.P., a Delaware limited partnership. It is owned by its general partner, BIC Corporation (1%), and its limited partner, NES Group, Inc. (99%), which was formerly known as Nesco Holdings, Inc. and as Nesco, Inc. Barth has no nonwholly owned subsidiaries.

Petitioner BMC Industries, Inc., has separately identified relevant information pursuant to Supreme Court Rule 29.6 (Petition at ii), and that information is not repeated here.

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1. The Eleventh Circuit decision brought for review has directed that judgment be entered in favor of Nesco Holdings, Inc. ("Nesco") on grounds unrelated to and independent of the issue on which BMC Industries, Inc. ("BMC") has sought review (Petition App. A at 39a). That decision of the Eleventh Circuit is now final. Inasmuch as Nesco is no longer exposed to liability in BMC's lawsuit or a party to the lawsuit, it takes no part in this certiorari proceeding. The other respondents named in the caption of the case are similarly not before the Court, as they were voluntarily dismissed by BMC prior to the district court's judgment and were not parties to the Eleventh Circuit proceeding. *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1324-25 n.2 (11th Cir. 1998).

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Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed December 30, 1998 ..... 34a

Respondent Barth Industries, Inc. ("Barth") files this brief in opposition to the petition for writ of certiorari filed by BMC Industries, Inc. ("BMC").

BMC has asked the Court to review the decision of the Eleventh Circuit Court of Appeals in *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322 (11th Cir. 1998), so that the Court can then order the case remanded to the Eleventh Circuit to provide that court with the opportunity to "reconsider" its decision not to certify a state law question in the case to the Supreme Court of Florida. (Petition at 16). Barth respectfully suggests that BMC's petition provides no "compelling" reason for the Court to exercise its certiorari jurisdiction authority, as required by the Court's Rule 10. The Court should decline to grant certiorari merely to direct the Eleventh Circuit to re-exercise its discretion to consider invoking a Florida certification procedure, when the court has already considered certification at BMC's request and declined to do so.[2]

BMC has argued to the Court that the decision of the Eleventh Circuit with regard to the requirement of "reliance" for waiver of a contract deadline under a Florida statute differs from the result reached in *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) — a decision addressing the requirement of reliance under Wisconsin law which was rendered by a panel majority of the Seventh Circuit Court of Appeals.[3] BMC asserts that the Eleventh Circuit's

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2. Attached as Appendices A and B to this brief in opposition are copies of BMC's petition for rehearing in the Eleventh Circuit, in which certification to the Supreme Court of Florida was sought (App. A at 15a), and the court's denial of the petition (App. B at 34a-35a).

3. Petitioner also argues conflict with an unpublished table decision of a majority panel of the Fourth Circuit Court of Appeals (Cont'd)

decision on the issue of waiver has created "intercircuit conflict" (Petition at 6, 12), and argues that if only the Eleventh Circuit would use Florida's certification procedure then the Florida Supreme Court would have an opportunity to agree with the Seventh Circuit's majority. There are several reasons that the Court should decline BMC's invitation to grant certiorari.

REASONS FOR DENYING THE WRIT

A. There is no intercircuit conflict.

There is no inter-circuit decisional conflict such as would warrant the Court's attention. Rule 10(a) suggests the types of "conflict" among the United States courts of appeals which might merit consideration by the Court, and it is significant that BMC makes no effort to bring itself within the ambit of the Rule.[4] BMC has only asked that the Court intercede so that the trial courts and the intermediate appellate courts of Florida can hear from the Florida Supreme Court, rather than have to consider what the Eleventh Circuit has opined, and so that the federal courts in the Eleventh Circuit will not be bound regarding the state law issue of whether Florida's

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(Cont'd)
interpreting Georgia law, *Flowers Ginning Co., Inc. v. Arma, Inc.*, 106 F.3d 390 (4th Cir. 1997). Citations to such unpublished dispositions are disfavored even within that circuit. *See* 4th Cir. L.R. 36(c). The decision has no effect on the arguments contained herein, even if it is considered by the Court.

4. BMC has not suggested that the Court should resolve the conflict between the circuits, nor can it: the *BMC Industries* case and *Wisconsin Knife Works* are premised on the statutes of different states. No federal question is posed by these cases.

commercial contract statute requires reliance for the waiver of a contract provision. (Petition at 9). BMC's purported concern for Florida's lower courts provides no compelling reason for the Court's exercise of its discretionary certiorari jurisdiction.

B. There is no unresolved question of state law for which certification would be appropriate.

The issue of "reliance" as a requisite for waiver of a contract term was not an unresolved question of Florida law on which the Eleventh Circuit opined as a matter of first impression. The court identified and followed existing Florida precedent on precisely that point, stating:

> At least one Florida court implicitly agrees with this conclusion; in *Linear Corp. v. Standard Hardware Co.*, 423 So. 2d 966 (Fla. 1st DCA 1982), the court held that a contract term had been waived despite the absence of any facts showing detrimental reliance.

(Petition App. A at 24a). The court went on to analyze the *Linear* decision, concluding that the Florida appellate court "implicitly held that a contract term could be waived without the existence of detrimental reliance by the non-waiving party." (Petition App. A at 25a). By identifying and following a construction of a Florida statute by one of Florida's district courts of appeal, the Eleventh Circuit eliminated any reason to invoke the certification process. Indeed,

> [W]here the applicable state law is clear, certification is inappropriate; it is not a procedure by which federal courts may abdicate their

> responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow.

Tidler v. Eli Lilly and Company, 851 F.2d 418, 426 (D.C. Cir. 1988).

It is not, of course, inappropriate for the Eleventh Circuit to have relied on a decision of a Florida intermediate appeal court. Federal courts often look to the decisions of state courts other than those of the state's highest court. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236-37 (1940); *accord Huron Holding Corporation v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188 n.7 (1941). As the Court observed in *West*:

> A state is not without law save as its highest court has declared it. . . . State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it . . . however much the state rule may have departed from prior decisions of the federal courts.
>
> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West, 311 U.S. at 236-37.

Moreover, the decision on which the Eleventh Circuit relied was not just persuasive authority to consider; it was binding precedent throughout Florida. The decisions of the Florida district courts of appeal represent the law of Florida unless and until they are overruled by the Florida Supreme Court and, in the absence of interdistrict conflict, are binding on the all Florida trial courts. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). The Court has recognized this precedential phenomenon in the state judicial hierarchies. *E.g.*, *Gooding v. Wilson*, 405 U.S. 518, 525, n.3 (1972) (federal courts will follow the holdings of the Court of Appeals of Georgia as to matters of Georgia law because they are binding on all trial courts in Georgia in the absence of a conflicting decision of the Supreme Court of Georgia).

The *Linear* decision was the first and only appellate decision in Florida involving detrimental reliance as an element of waiver under Section 672.209, Florida Statutes. Thus, the Eleventh Circuit was not *establishing* controlling precedent for Florida's courts, as BMC charges (Petition at 9); it was *following* controlling precedent which the Florida trial courts were already obliged to honor. *See Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 237-38 n.1 (1967) (holding that Florida's district courts of appeal are courts of last resort in the state for purposes of seeking certiorari review in this Court).

The Eleventh Circuit's reliance on *Linear* is no different than the reliance that would have been required of any trial court in the state. Federal courts act in the capacity of state courts when they opine on issues of state law. *King v. Order of United Commercial Travelers of American*, 333 U.S. 153, 161 (1948). Under Florida law, the Seventh Circuit's decision in *Wisconsin Knife Works* would not have been binding on a

Florida court. *See, e.g.*, *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) ("lower federal court rulings . . . are not binding on state courts"); *Standard Accident Insurance Co. v. Gavin*, 184 So. 2d 229, 231 (Fla. 1st DCA 1966), *cert. dismissed*, 196 So. 2d 440 (Fla. 1967) (declining to follow decisions of a foreign jurisdiction where Florida precedent is to the contrary). Consequently, *Wisconsin Knife Works* should not have been binding on the Eleventh Circuit even if it had been inclined to follow it, in light of the contrary decision in *Linear*.

C. The decisions of the Court provide no basis to support a grant of certiorari simply to force the Eleventh Circuit to reconsider certification to the Florida Supreme Court.

BMC has argued that decisions of the Court indicate a preference for federal appellate courts to use state certification processes to resolve issues of state law. BMC's reference to select comments in certification decisions from the Court is unconvincing.

BMC references *Leavitt v. Jane L.*, 518 U.S. 137 (1996), for the proposition that the Court will not turn a blind eye to a federal court's state law determination which is plainly wrong. (Petition at 13-14). That is not precisely what the Court held. It started with the proposition that certiorari petitions are not normally granted to review what purports to be an application of state law, and it then held that the Court will review decisions "where the alternative is allowing blatant federal-court nullification of state law." 518 U.S. at 144-45. The Eleventh Circuit, however, did not nullify Florida law in this case; as noted, it *followed* Florida precedent.

BMC also references *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), as reflecting the Court's strong endorsement

of certification as a process to have "a state court first address an important, yet unclear question." (Petition at 13). *Lehman* actually held, in a situation involving ***no*** Florida case on the issue, that certification is not an obligatory process, that its use in any given case "rests in the sound discretion of the federal court," but that certification is particularly appropriate where federal judges in New York are attempting to predict uncertain Florida law because they are " 'outsiders,' lacking the common exposure to local law which comes from sitting in the jurisdiction." 416 U.S. at 391. The distinctions between *Lehman* and this case are obvious: the judges of the Eleventh Circuit are not outsiders; the Eleventh Circuit has already been asked to exercise its discretion and declined to do so; and the issue of reliance for a waiver of contract terms was *not* unsettled in Florida.

Perspective on the certification process is provided by Chief Justice Rehnquist's concurring opinion in *Lehman*:

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Lehman, 416 U.S. at 395 (Rehnquist, J., concurring).

D. There is no important legal issue at stake.

The Eleventh Circuit's decision that detrimental reliance is not a requirement for waiver of a contract provision under Florida law does not, as BMC states, involve "a point of law adversely impacting business transactions in Florida."

(Petition at 9). The court's decision is completely neutral, like every other provision in the Uniform Commercial Code. The presence or absence of required reliance for waiver merely sets the rule for waivers by which commercial enterprises can govern their conduct.

BMC over-dramatizes the alleged effect of the Eleventh Circuit's decision on "interstate and international commercial transactions in a major trade center" by asserting that the court adopted a minority position on the issue of detrimental reliance for contract waiver, allegedly contrary to what the drafters of the UCC had intended. (Petition at 12). BMC is mistaken. The fact is there is neither a majority nor a minority view on the point for, as noted by Judge Posner in the *Wisconsin Knife Works* decision, cases throughout the country are simply "diverse in outlook." 781 F.2d at 1288. That diversity in views offers no reason for the Court to exercise its jurisdiction in order to push the Eleventh Circuit to request that the Florida Supreme Court be given the opportunity to align itself with a view which will benefit BMC in this litigation.

E. Certification would hinder rather than advance the resolution of this lawsuit.

The Eleventh Circuit has recognized that it will sometimes decide questions of state law even when there is doubt as to how a state court would resolve the issue, without recourse to certification. *Escareno v. Noltina Crucible and Refractory Corporation*, 139 F.3d 1456, 1461 (11th Cir. 1998). State courts, like their federal counterparts, are busy institutions, with their own caseloads to manage. *Id.* The Chief Justice has recognized, in considering certification of an issue to the Florida Supreme Court, that delay and expense are factors to be taken into account.

> While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court. The Supreme Court of Florida has promulgated an appellate rule [now Rule 9.150] which provides that upon certification by a federal court to that court, the parties shall file briefs there according to a specified briefing schedule, that oral argument may be granted upon application, and that the parties shall pay the costs of the certification. Thus while the certification procedure is more likely to produce the correct determination of state law, additional time and money are required to achieve such a determination.

Lehman, 416 U.S. at 394-95 (Rehnquist, J., concurring). Delay and further expense are significant factors here.

BMC's lawsuit against Barth began in 1989. It did not reach the Eleventh Circuit until 1995, and under the best of circumstances a decision by the Florida Supreme Court (duplicating the judicial labor already expended by the Eleventh Circuit) could not be expected until well into the year 2000. *See, e.g.*, *State of Florida ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir.) ("[t]he experience in our Circuit has been that the process requires a period approaching one year at the least — sometimes much more"), *cert. denied*, 425 U.S. 930, *cert. denied*, 429 U.S. 829 (1976). The prospect of a decision coming two and one half years after the filing of the complaint was considered by the Fifth Circuit as "particularly significant" in evaluating certification to the Florida Supreme Court. *Exxon*, 526 F.2d at 275-76. The legal

issue that troubles BMC is not so uncertain, so unsettled, or so significant to national and international commerce that this contract dispute should be maintained in judicial limbo well beyond the passage of a decade.

Running through BMC's brief is the notion that the Eleventh Circuit wrongly decided the issue of detrimental reliance as an interpretation of the Uniform Commercial Code. The Court has traditionally shown great deference to the decisions of federal courts of appeal on state law questions, unless their conclusions are shown to be unreasonable. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). The Eleventh Circuit's decision to follow the only Florida precedent on the issue, the *Linear* decision of Florida's First District Court of Appeal, was eminently reasonable.[5]

F. Certification is not appropriate whenever federal courts interpret issues of state law.

The establishment of a certification procedure by the State of Florida does not mean that the Florida Supreme Court wants to be consulted whenever an unresolved matter of Florida law comes before the Eleventh Circuit, as BMC suggests (Petition at 7). BMC overstates the role of certification in Florida. Indeed, the Florida Supreme Court "may," but need not, accept any question certified from a federal appellate court; it has discretion to decline consideration. *See* Art. V, § 3(b)(6), Fla. Const.; Section 25.031, Fla. Stat. (1998); Fla. R. App. P. 9.150(a). (Petition at 3-5).

---

5. Judge Easterbrook dissented in *Wisconsin Knife* for the reasons expressed in the decision of the Eleventh Circuit.

The Florida Supreme Court has noted that a litigant faced with an unsettled question of state law has choices. It can have the issue resolved in the federal proceeding it initiated, request certification where available (which the federal court may or may not choose to provide), or seek a stay in the federal district court proceeding and pursue a declaratory action in the state courts. *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 376 (Fla. 1977).

BMC chose to bring this diversity action in federal court. It was only after it received an unfavorable ruling from the Eleventh Circuit that a state court determination of legal issue is being sought. While there is nothing to bar BMC from suggesting the desirability of certification, as it already has done unsuccessfully, a state high court is justified in carefully considering a request from a party who chose to invoke federal jurisdiction in the first place. *See, e.g., Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977):

> [T]he bar should take notice that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort.

The First Circuit observed in *Cantwell* that "two bite" skepticism is particularly appropriate when it appears that certification is not sought to resolve unsettled state law, but only to afford the state court an opportunity to change existing state law. *Id.* That, of course, is precisely the situation here.

BMC elected to be in federal court. In declining certification, the Eleventh Circuit may well have considered

that BMC should be bound by its own tactical decision since it knowingly sought a federal resolution of state law contract issues. *Seaboard Surety Company v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987); *Mobil Oil*, 354 So. 2d at 377.

CONCLUSION

BMC's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — SUGGESTION OF REHEARING *EN BANC* AND PETITION FOR REHEARING DATED DECEMBER 9, 1998

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

CASE NO. 95-5137

BMC INDUSTRIES, INC.,

Plaintiff/Appellee,

vs.

BARTH INDUSTRIES, INC.; NESCO HOLDINGS, INC. f/k/a NESCO, INC.; NESCO, INC. f/k/a NESCO MANAGEMENT, INC.; BARTH INDUSTRIES CO. LIMITED PARTNERSHIP and BIC CORPORATION,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SUGGESTION OF REHEARING *EN BANC* OF APPELLEE BMC INDUSTRIES, INC. AND PETITION FOR REHEARING

Appendix A

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Appendix A

BMC INDUSTRIES, INC. V. BARTH INDUSTRIES

Case No. 95-5137

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to *Fed. R. App. P.* 26.1 and the corresponding Circuit Rules, the following constitutes a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships or corporations that may have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations and other identifiable legal entities related to a party:

1. Charles M. Auslander, Esquire
2. Richard S. Banick, Esquire
3. William Clayton, Esquire
4. John Kelso, Esquire
5. Steven Stark, Esquire
6. Barth Industries Co. Limited
7. Barth Industries, Inc.
8. Rebecca E. Bender, Esquire

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9. BIC Corporation

10. Michale J. Black, Esquire

11. BMC Industries, Inc.

12. John G. Crabtree, Esquire

13. Samuel J. DeMarco

14. Arthur J. England, Jr., Esquire

15. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.

16. Honorable Barry L. Garber, U.S. District Court, Southern District of Florida

17. Honorable Donald L. Graham, U.S. District Court, Southern District of Florida

18. Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.

19. John R. Hargrove, Esquire

20. W. Kent Brown, Esquire

21. Bruce A. Weihe, Esquire

22. Kenneth W. Waterway, Esquire

23. Heinrich Gordon Hargrove Weihe & James, P.A.

24. Richard N. Legan

25. Honorable Stanley Marcus, U.S. District Court, Southern District of Florida

26. Honorable K. Michael Moore, U.S. District Court, Southern District of Florida

27. Honorable Federico A. Moreno, U.S. District Court, Southern District of Florida

28. Nesco Holdings, Inc. f/k/a Nesco, Inc.

29. Nesco, Inc. f/k/a Nesco Management, Inc.

30. Oppenheimer Wolff & Donnelly

31. Honorable Peter R. Palermo, U.S. District Court, Southern District of Florida

32. Steven Schmoll

33. Robert J. Tomsich

34. Mark P. Wine, Esquire

Appendix A

CERTIFICATION OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance. Specifically, the intercircuit conflict created by the panel decision frustrates the very purpose of the Uniform Commercial Code which has been adopted in forty-nine states to achieve uniformity and avoid confusion in commercial transactions.

s/ John R. Hargrove
John R. Hargrove
Attorney of Record for appellee,
BMC Industries, Inc.

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SECONDARY RESOURCES

6 Corbin, *Corbin on Contracts* 211 (1962) 5

Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 Wash. U.L.Q. 277, 298-302 (1980) 5

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Florida Statutes § 672.209(4) 6

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Appendix A

STATEMENT OF ISSUE FOR *EN BANC* CONSIDERATION

THE PANEL DECISION ACKNOWLEDGES ON ITS FACE THAT ITS DECISION REGARDING WAIVER UNDER THE UCC EXPRESSLY AND DIRECTLY CONFLICTS WITH ALL OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE.

INTRODUCTORY STATEMENT

This is a commercial diversity case governed by Florida law. The matter is being submitted for *en banc* review because of an express and direct intercircuit conflict recognized by the panel in its opinion. Specifically, the panel has decided an issue dealing with the definition of "waiver" under Article 2 of the Uniform Commercial Code contrary to Chief Judge Posner's Seventh Circuit opinion on the same point, which decision — without exception — has been cited with approval and followed by every court and treatise dealing with the question. Because of the widespread commercial implications of this newly-created split of authority relating to a fundamental issue under Article 2, BMC urges *en banc* review or, in the alternative, certification of the issue to the Florida Supreme Court by the deciding panel.

STATEMENT REGARDING COURSE OF PROCEEDINGS AND DISPOSITION

In October 1986, BMC signed a contract with BARTH to design, manufacture and install a system to automate production of plastic eyeglass lenses. (P-Ex. 32; P-Ex. 34)

Appendix A

The contract stated that BMC was relying on BARTH's expertise to design an appropriate system to meet BMC's needs. The record makes it clear that (a) BARTH, which was not the lowest bidder, was chosen because of its corporate affiliation with NESCO, and (b) after multiple completion date extensions had come and gone, BMC stayed with the project because of its reliance on NESCO's assurances that the project would be completed eventually. The jury was presented with all of this evidence and returned verdicts against BARTH and NESCO respectively for breach of contract and promissory estoppel in the amounts of $3 million and $2.1 million. A panel of this court has reversed for a new trial as to BARTH and for the entry of judgment in favor of NESCO.

STATEMENT OF ESSENTIAL FACTS

Despite fourteen promised completion dates which had come and gone, despite repeated warnings issued to BARTH by BMC to deliver a workable system (spanning a period of more than twenty months beyond the final contract delivery deadline), despite BMC's reliance upon BARTH's parent company, NESCO, which promised that the project would be completed, *no workable system was ever delivered to BMC.* In early June of 1989, BMC sued.

Prior to trial, BARTH and NESCO had moved for partial summary judgment claiming that the contract was for "goods", not "services"; that the UCC therefore applied; that under the UCC, BMC failed to give an acceptable "notice of breach" and "reasonable opportunity to cure"; and that consequently BMC was not entitled to relief under the

contract. BMC prevailed on the issue, the trial court holding that the common law — not the UCC — governed the transaction. (R12:464)

The deciding panel reversed for a new trial as to BARTH concluding that the UCC should have been applied; that under the UCC, "waiver" of a performance deadline by a buyer does not require "detrimental reliance" by a seller; that BMC, as the buyer waived the performance deadline as a matter of law; that the performance deadline was therefore extended for a "reasonable time"; and that a new jury should therefore decide whether the extended time for performance was reasonable or not. The panel reversed the promissory estoppel verdict against NESCO, and directed the entry of judgment in its favor, holding that the statute of frauds barred recovery.

ARGUMENT FOR REHEARING *EN BANC*

THE PANEL DECISION ACKNOWLEDGES ON ITS FACE THAT ITS DECISION REGARDING WAIVER UNDER THE UCC EXPRESSLY AND DIRECTLY CONFLICTS WITH ALL OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE.

The panel's decision turned on its interpretation of "waiver" under § 2-209(4) of the Uniform Commercial Code, which had been adopted in Florida as *Florida Statutes* § 672.209(4). In analyzing the issue, the panel acknowledged that it was creating express and direct conflict with Chief Judge Posner's decision in *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F. 2d 1280 (7th Cir. 1986). That case holds that a waiver under the UCC *must be supported by*

detrimental reliance — which is precisely how the issue was decided by the jury in this case under stipulated instructions.

In *Wisconsin Knife Works*, the buyer had contracted for the purchase of spade bit blanks to use in its manufacturing process. The parties had agreed that no modification of the contract would be binding unless made in writing and signed by the buyer's representative. When the seller later failed to meet the contractual deadline, the buyer sued for breach of contract. The seller claimed that based on the buyer's conduct, the buyer had waived the deadline. The district court agreed with the seller and entered judgment in its favor.

On appeal, the Seventh Circuit reversed. In so ruling, the court analyzed the question of whether the seller could nullify the contract term requiring that modifications be in writing simply by relabelling the buyer's conduct as a "waiver" under § 2-209(4), rather than calling it a "modification" under § 2-209(2). Writing for the court, Chief Judge Posner explained that the buyer's conduct could not be deemed a waiver without detrimental reliance on the part of the seller. He reasoned as follows:

> If § 2-209(4), which as we said provides that an attempted modification which does not comply with subsection (2) can nevertheless operate as a "waiver," is interpreted so broadly that any oral modification is effective as a waiver notwithstanding § 2-209(2), both provisions become superfluous . . . . The path of reconciliation with subsection (4) is found by attending to the precise wording of (4). It does not

> say that an attempted modification "is" a waiver; it says that "it can operate as a waiver." It does not say in what circumstances it can operate as a waiver; *but if an attempted modification is effective as a waiver only if there is reliance, then both §§ 2-209(2) and 2-209(4) can be given effect.*

Id. at 1286-87 (Emphasis added) The court went on to say:

> Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something to the way of credibility to the mere say-so of one party. . . . We find support for our proposed reconciliation of subsections (2) and (4) in the secondary literature. *See* Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 Wash. U.L.Q. 277, 298-302 (1980); Farnsworth, *Contracts*, at 476-77 (1982); 6 Corbin, *Corbin on Contracts*, 211 (1962).

Id.

In reaching the conclusion that the two provisions are not superfluous and that a "waiver" is effective only where there is reliance by the non-waiving party, the Seventh Circuit appropriately construed "modification" and "waiver" in such a way as to give independent, but reconcilable, meaning to both subsections (2) and (4). *See generally* White & Summers, *Uniform Commercial Code*, § 1-6, at 33-34 (West 1995). This

rule of statutory construction is precisely what Florida courts require. Courts must interpret statutes as to give effect to *all* statutory provisions. *See, e.g., Unruh v. State*, 669 So. 2d 242 (Fla. 1996); *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992). The Fourth Circuit has followed *Wisconsin Knife*. *See Flowers Ginning Corp. v. Arma, Inc.*, 106 F. 3d 390, 1997 WL 26573 (4th Cir. 1997). In accordance with 11th Cir. R. 36-2, a copy of that opinion is attached hereto as Exhibit "A". As Chief Judge Posner stated in *Wisconsin Knife*, the draftsmen of § 2-209 "did not just want to give 'modification' another name — 'waiver' ". 781 F. 2d at 1288. To the contrary, the drafters intended independent meaning, yet the panel's decision disrupts that intent. *En banc* review is therefore requested.

PETITION FOR REHEARING
SUGGESTION OF CERTIFICATION

Since Florida courts have not directly addressed the waiver issue under *Florida Statutes* § 672.209(4), the panel on rehearing may wish to consider certifying the "waiver" issue to the Florida Supreme Court. The commercial implications of the decision are indeed far reaching, and the Florida Supreme Court should be afforded the opportunity to determine whether Florida UCC law follows the panel's view or the view of the Seventh and Fourth Circuits and commentators.

ARGUMENT FOR REHEARING

At trial, counsel for BARTH and NESCO *conceded* that the relevant UCC and contract law principles were the same.

(T:1017) The jury was then instructed on the issue of waiver under contract law based on BARTH and NESCO's own requested instructions. (R15:561-30-32; R15:561-43) Since the law in this circuit does not permit a party to benefit from an alleged error which it not only *concedes* but *invites*, the panel never should have addressed the UCC issue in the first place. *See, e.g.*, *United States v. Paradise*, 98 F. 3d 1266, 1285 (11th Cir. 1996), *United States v. Chandler*, 996 F. 2d 1073, 1084 (11th Cir. 1993); *Leverett v. Spears*, 877 F. 2d 921, 924 (11th Cir. 1989).

As to promissory estoppel, the court reversed because it viewed NESCO's promise as "collateral", rather than "direct." The Florida Supreme Court, however, has held that this is a question of fact for the jury, *Bruce Construction Corp. v. State Exchange Bank*, 102 So. 2d 288 (Fla. 1958), and the jury in this case was properly instructed on the point *in accordance with NESCO's own requested instruction.* (T:1963; R15:561-73). *See Hilkmeyer v. Latin American Air Cargo Expediters*, 94 So. 2d 821, 825-26 (Fla. 1957).

CONCLUSION

In reversing the jury's verdict below, the panel has created express and direct conflict on a significant issue in the area of commercial law. The court is urged to review this case *en banc* or certify the issue to the Florida Supreme Court.

Appendix A

EXHIBIT A

FLOWERS GINNING COMPANY, INCORPORATED, d/b/a Warren Brothers Gin, Plaintiff-Appellee,

v.

ARMA, INCORPORATED; Ritch McCutchen, Defendants-Appellants.

No. 96-1314.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 4, 1996.

Decided Jan. 24, 1997.

* * *

Before WIDENER and HAMILTON, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION

PER CURIAM:

ARMA, Inc. (ARMA), a distributor of cotton ginning equipment, appeals the magistrate judge's denial of its motion for judgment as a matter of law, or in the alternative for a new trial, see Fed.R.Civ.P. 50, following a jury verdict in

favor of Flowers Ginning Company, Inc. (Flowers Ginning), a company which had purchased certain ginning equipment from ARMA. We affirm.

I.

Flowers Ginning is a North Carolina corporation which operated a cotton gin in Newton Grove, North Carolina, from 1986 to 1994. Glenn Flowers was the sole shareholder in Flowers Ginning and continually served as its president. Charlie Warren and Tommy Warren (the Warren brothers), Glenn Flowers' nephews, conducted the day-to-day operations of Flowers Ginning. ARMA is a Georgia corporation with its principal place of business in Cordele, Georgia. ARMA sells and installs new and used cotton ginning equipment.

In 1991, Flowers Ginning decided to purchase a universal density (UD) cotton press and other related equipment in order to serve the needs of its customers as well as meet new cotton ginning volume expectations during a boom year for cotton production. Accordingly, ARMA and Flowers Ginning began discussing a deal whereby Flowers would purchase the UD press and related equipment from ARMA. In light of this contemplated deal, Flowers Ginning began informing its customers about its upcoming increased capacity for production and apparently secured oral commitments to gin 12,314 bales of cotton for the 1991 ginning season.

During the second week of July 1991, Flowers Ginning contacted Southern National Bank (Southern National) to discuss financing for the contemplated equipment purchase

from ARMA. On August 19 or August 20, Southern National indicated to Flowers Ginning that it was prepared to make the loan. Accordingly, on or about August 20, Flowers Ginning contacted ARMA's president, Ritch McCutchen (McCutchen), to advise him that it had arranged financing and stood ready to purchase the UD press and other related equipment.

On August 21, McCutchen drafted the written contract at issue here, signed it, and flew to North Carolina to secure Glenn Flowers' signature. For reasons not fully explained in the record, Glenn Flowers was not available to sign the contract that day. Therefore, McCutchen left the contract with Flowers Ginning in North Carolina for Glenn Flowers' signature. The written contract provided that some of the equipment would be delivered immediately; that other equipment would be delivered approximately thirty days from the date the contract was signed; and that other equipment would be delivered within ninety days. Glenn Flowers signed the contract on August 22. That same day, Southern National issued commitment papers for the loan.

On August 26, 1991, Glenn Flowers, the Warren brothers, and Flowers Ginning's corporate attorney, Miles B. Fowler (Fowler), met with Richard DeBose (DeBose), a Southern National executive. According to Flowers Ginning, during a telephone call between DeBose and McCutchen that took place during this meeting, DeBose expressed his desire that the equipment be installed and operational in time for the 1991 ginning season. DeBose's desire rested on his concern that Flowers Ginning would be otherwise unable to repay the loan. DeBose and McCutchen then allegedly agreed that

ARMA would have the UD press and related equipment installed and operational by October 1. DeBose then reported McCutchen's agreement to an October 1 installation and operational deadline to Glenn Flowers and the Warren brothers who were present at the meeting.

In completing the loan closing, DeBose relied heavily on McCutchen's promise to have the UD press and related equipment installed and operational by October 1. In addition, Flowers Ginning authorized Southern National to disburse funds to ARMA only after McCutchen promised to have the UD press and related equipment installed and operational by October 1. At the trial however, McCutchen testified that he and DeBose never discussed ARMA having the UD press and related equipment installed and operational by October 1 and that he did not know that Glenn Flowers and the Warren brothers were in the room during his August 26 telephone conversation with DeBose.

On August 27, 1991, Flowers Ginning, through Southern National, paid ARMA the earnest money called for in the contract. ARMA nonetheless failed to have the equipment installed and operational by October 1. ARMA provided all of the equipment subject to the contract by November 12, 1991, a date within the delivery schedule called for in the original written contract as signed by McCutchen and Glenn Flowers.

Flowers Ginning subsequently filed suit against ARMA in the United States District Court for the Eastern District of North Carolina. The suit alleged claims for breach of contract, fraud, civil conspiracy, recision, and unfair trade practices.

Flowers Ginning sought compensatory damages for: (1) costs it incurred in completing the installation of the UD press and related equipment; and (2) for lost profits that allegedly resulted from ARMA's failure to have the ginning equipment installed and operational by October 1. Specifically, Flowers Ginning determined that it incurred a total of $183,255 for expenses and improvements to finish installing the UD press and related equipment and make the completed gin operational. (J.A. 545-46). In addition, because Flowers Ginning could not conduct ginning operations for the Fall 1991 ginning season, it could not carry through with its commitments to gin 12,314 bales of cotton. For that season and succeeding years, Flowers Ginning asserted lost calculable profits of over $200,000. (J.A. 554, 570-74, 939).

Following discovery, ARMA filed a motion for summary judgment, which the district court granted in part and denied in part. Accordingly, the district court entered judgment for ARMA on Flowers Ginning's claim for civil conspiracy, but allowed the breach of contract, fraud, recision, and unfair trade practices claims to be tried before a jury. Then the parties consented to trial of this matter before a United States Magistrate Judge. See 28 U.S.C. § 636(b)(2) (1990).

Subsequently, ARMA filed a motion in limine to exclude any evidence that the parties orally agreed to modify the contract to set an October 1 installation and operational deadline, rather than a November 19 installation and operational deadline.[1] In support of the motion, ARMA

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1. The ninety day installation and operational deadline provided in the written contract fell on November 19, 1991.

argued that the statute of frauds and the parol evidence rule as contained in the Georgia Commercial Code (GCC), see Ga.Code Ann. §§ 11-2-201 to 202, barred any evidence of an oral modification before August 27, the date Flowers Ginning paid ARMA the "earnest money."[2] Determining that August 21 constituted the effective date of the contract rather than August 27, the magistrate judge denied ARMA's motion. The case then proceeded to trial.

At the close of Flowers Ginning's case, ARMA made a motion for judgment as a matter of law, see Fed.R.Civ.P. 50(a), which the magistrate judge denied. Flowers Ginning then withdrew its recision claim, leaving only its claim for breach of contract against ARMA and its claims for fraud and unfair trade practices against both ARMA and McCutchen. At the close of all the evidence, ARMA renewed its motion for judgment as a matter of law. The magistrate judge denied the renewed motion.

The case proceeded to the jury, which returned a verdict in favor of Flowers Ginning on its breach of contract claim against ARMA and on its unfair trade practices claim against ARMA and McCutchen. Conversely, the jury found in favor of ARMA and McCutchen on Flowers Ginning's fraud

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2. ARMA claimed: (1) without the payment of the earnest money there was no contract, therefore, the contract did not come into effect until August 27, 1991; (2) the only evidence of any oral modification to the contract occurred prior to the payment of the earnest money, and therefore, any evidence of an oral modification should have been excluded as parol; and (3) without any oral modification, there was no breach because it fulfilled its obligations under the contract by November 19, 1991.

claims. The jury awarded $330,555 on the breach of contract claim against ARMA and $1 on the respective unfair trade practices claims against ARMA and McCutchen. Finding insufficient evidence as a matter of law to support the jury's verdict against either defendant for unfair trade practices, the magistrate judge entered judgment in favor of both ARMA and McCutchen on those claims. The magistrate judge did not disturb the jury's verdict on the breach of contract claim.

ARMA subsequently filed a motion for judgment as a matter of law or in the alternative for a new trial, see Fed.R.Civ.P. 50(b), on two grounds. First, ARMA contended that the magistrate judge erroneously allowed the admission of evidence relating to oral contract modifications occurring before August 27, 1991, and without that evidence no reasonable jury could have found it liable for breach of contract. Second, and in the alternative, ARMA contended that even if it breached the contract, Flowers Ginning presented insufficient evidence to support the damage award on the breach of contract claim. The magistrate judge denied the motion. ARMA timely appealed.[3]

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3. Technically, both ARMA and McCutchen appealed the magistrate judge's denial of the motion for judgment as a matter of law, see Fed.R.Civ.P. 50(b). However, once the magistrate judge dismissed the unfair trade practices claim against McCutchen, there was no judgment against him and nothing for him to appeal. Accordingly, throughout this opinion, we refer to ARMA as the only appealing party.

II.

ARMA first argues that the magistrate judge's decision to instruct the jury on the GCC, as opposed to Georgia's general contract law, was erroneous.[4] We disagree.

When the magistrate judge instructed the jury on the applicable law, he framed the case for the jury in terms of the GCC.[5] However, ARMA did not object to the magistrate judge's instructions.

It is settled law that in order to properly preserve an objection to jury instructions, a party must state "distinctly the matter objected to and the grounds for the objection." Fed.R.Civ.P. 51; see Mattison v. Dallas Carrier Corp., 947 F.2d 95, 112 (4th Cir.1991). Because ARMA never objected to the magistrate judge's instructions to the jury on the GCC rather than general Georgia contract law, ARMA failed to preserve that issue for appeal. In any event, the magistrate judge correctly determined that the GCC applied to resolve the breach of contract claim.

Article 2 of the GCC applies to all "transactions in goods," Ga.Code Ann. § 11-2-102, and defines "goods" as

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4. ARMA presumably argues for the application of Georgia general contract law because, as opposed to the GCC, Georgia general contract law arguably contains: (1) stricter requirements for contract formation; (2) a more rigorous parol evidence rule; and (3) a narrower definition of what can constitute compensatory damages once there has been a breach of contract.

5. The parties agree that Georgia law applies to this case.

all things which were moveable at the time those things were identified to the contract. Ga.Code Ann. § 11-2-105(1). According to Georgia law, "[w]hen the predominant element of a contract is the sale of goods, the contract is viewed as a sales contract and the [GCC] applies, 'even though a substantial amount of service is to be rendered in installing the goods.' " J. Lee Gregory, Inc. v. Scandinavian House, 433 S.E.2d 687, 689 (Ga.Ct.App.1993) (quoting Anderson, Uniform Commercial Code, § 2-104:38); see also Beaulieu of Am., Inc. v. Coronet Ind., Inc., 327 S.E.2d 508, 510 (Ga.Ct.App.1985). Only when the predominant element of the contract is the furnishing of services should the contract be viewed as a service contract, thus requiring the application of Georgia general contract law. See, e.g., Mail Concepts v. Foote & Davies, Inc., 409 S.E.2d 567 (Ga.Ct.App.), cert. denied, 200 Ga.App. 896 (1991).

Here, the contract dispute arose over the installation of the UD press and related equipment. Nevertheless, the sale of the UD press and related equipment always constituted the predominant object of the contract. Effectively, the installation amounted to nothing more than a particularized mode and method of delivery. Because the sale of the UD press and related equipment constituted the predominate object of the contract, the GCC applied to resolve Flowers Ginning's breach of contract claim.

III.

Next, ARMA challenges the magistrate judge's decision to admit evidence that the parties modified the contract on

August 26 to set an October 1 installation and operational deadline. According to ARMA, both the statute of frauds and the parol evidence rule as contained in the GCC barred any evidence that the parties orally modified the contract. See Ga.Code Ann. §§ 11-2-201 to 202. We review evidentiary rulings for an abuse of discretion. See Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 126 (4th Cir.1995). "The legal standards the district court applies in making its evidentiary rulings, however, are reviewed de novo." Id.

A.

ARMA argues that the admission of the evidence of the August 26 modification violated the GCC statute of frauds because it was not in writing. This argument has no merit.

The GCC statute of frauds has been interpreted as setting forth three definite requirements for a writing to be sufficient as an enforceable contract: (1) the writing must evidence a contract for the sale of goods; (2) it must be signed by the party to be charged; and (3) it must specify a quantity. O.N. Jonas Co., Inc. v. Badische Corp., 706 F.2d 1161, 1163 (11th Cir.1983); see also Ga.Code Ann. § 11-2-201. A contract for the sale of goods may be made in "any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Ga.Code Ann. § 11-2-204(1). Price, time and place of payment or delivery, general quality of the goods, or any particular warranties may all be omitted and supplied by course of trade or be agreed to on a later date, whether by an additional written instrument

or by oral evidence.[6] Alice v. Robett Mfg. Co., Inc., 328 F.Supp. 1377 (N.D.Ga.1970), aff'd, 445 F.2d 316 (5th Cir.1971).

Georgia case law is unclear as to whether an oral modification must be reduced to writing in order to satisfy the GCC statute of frauds. Like every other state that has adopted § 2-209 of the Uniform Commercial Code as its substantive law dealing with modification of a contract for the sale of goods, GCC § 2-209(3) states that "[t]he requirements of the statute of frauds section of [the GCC] must be satisfied if the contract as modified is within its provisions." Ga.Code Ann. § 11-2-209(3). As two notable commentators on the Uniform Commercial Code have said, "[t]he impact of this provision is not clear." James J. Wright & Robert S. Summers, Uniform Commercial Code § 1-6 at 56 (3d ed.1988). The commentators recognize a split of authority among the states regarding possible interpretations, with one state interpreting the provision to require that if the original contract was within the statute of frauds section, then any modification thereof must also be in writing. Id. Other less stringent interpretations construe the provision as requiring a writing only if the modification brings the entire deal within the statute of frauds for the first time or if it changes the quantity term of the original contract. See id.

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6. The parties do not dispute that the contract in its form on August 21 satisfied the GCC statute of frauds. ARMA and Flowers Ginning intended to enter into a contract for the sale of a UD press and related equipment. ARMA signed a written instrument on August 21, which contained all the necessary indicia of a contract for the sale of goods, including specifying a quantity term. See Ga.Code Ann. § 11-2-201.

Georgia case law does not give us any guidance as to how we should interpret GCC § 2-209(3) for purposes of this litigation. We need not, however, forecast Georgia's interpretation. GCC § 2-209(4) provides that a modification can operate as a waiver of the right to assert a defense under the GCC statute of frauds, see Ryder Truck Lines, Inc. v. Scott, 201 S.E.2d 672, 675 (Ga.Ct.App.1973), and that is the situation here. A modification may operate as a waiver if there is reasonable reliance. Wisconsin Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1287 (7th Cir.1986); Trad Indus., Ltd. v. Brogan, 805 P.2d 54, 59 (Mont.1991). The evidence in the record reveals conduct by ARMA and reliance by Flowers Ginning sufficient to estop ARMA from insisting upon enforcement of the original installation and operational deadline. See Irvin v. Lowe's of Gainsville, Inc., 302 S.E.2d 734, 736 (Ga.Ct.App.1983) (when a promisee reasonably and foreseeably relies on a promise to his detriment, the promise is binding if injustice can by avoided only be enforcement of the promise). Accordingly, ARMA cannot take advantage of the GCC statute of frauds to bar evidence that it and Flowers Ginning orally agreed to modify the contract to provide for an October 1 installation and operational deadline.

B.

The GCC parol evidence rule provides in pertinent part:

> Terms . . . which are . . . set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a

> contemporaneous oral agreement but may be explained or supplemented:
>
> (a) by a course of dealing or usage of trade or by a course of performance; and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Ga.Code Ann. § 11-2-202. Strongly contending that the contract did not become effective until August 27 when Flowers Ginning paid the earnest money, ARMA contends that the evidence supporting Flowers Ginning's contention that the parties orally modified the contract on August 26 to provide for an October 1 installation and operational deadline, rather than November 19, should have been excluded under the GCC parol evidence rule as evidence of a prior agreement that contradicted an express term of the written contract. We disagree.

Initially, we note that, notwithstanding ARMA's argument to the contrary, the magistrate judge properly determined that August 21 constituted the effective date of the contract. The contract provided that it "be exercised not before the expiration of 10 days nor after the expiration of 90 days from the date hereof." (J.A. 1275). Because the contract was signed by ARMA's president on August 21, 1991, that date constituted the "date hereof." Id. August 21 constituted the effective date of the contract despite subsequent language in the contract that suggested the

contract would not become effective until Flowers Ginning paid ARMA the earnest money. Specifically, the contract provided that "[t]he buyer shall consummate the purchase during said period by tendering the purchase price in the manner described above." (J.A. 1275). The contract called for $263,130 to be paid in earnest money that would be "credited against the purchase price when [the contract] is consummated." (J.A. 1274). At best then, the contract is ambiguous with respect to its effective date. Because ARMA prepared the contract, any ambiguity in its terms must be construed against it. See Considine Co. of Ga., Inc. v. Turner Communications Corp., 273 S.E.2d 652 (Ga.Ct.App.1977). Thus, we cannot say that the magistrate judge erred by concluding that the contract became effective on August 21, the date ARMA's president signed the contract.[7]

Having concluded that the magistrate judge correctly determined that August 21 constituted the effective date of the contract, the GCC parol evidence rule loses all applicability to the evidence which ARMA argues was erroneously admitted. The GCC parol evidence rule bars admission of evidence of any "prior agreement[s]" or any "contemporaneous oral agreement[s]" which contradict the terms of the parties' final written agreement. Ga.Code Ann. § 11-2-202. "[T]he parol evidence rule simply does not apply

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7. ARMA also argues that, during his cross examination, Charlie Warren admitted that there was no contract between Flowers Ginning and ARMA until Flowers Ginning paid the earnest money. ARMA's argument is without merit. Our review of the record reveals that such an admission by Charlie Warren is far from clear, and cannot form a basis for concluding that the magistrate judge erred by determining that the contract became effective on August 21.

to evidence of subsequent agreements or modifications." Wright & Summers, supra at 98; see also Wayman v. Amoco Oil Co., 923 F.Supp. 1322, 1340 (D.Kan.1996) ("The parol evidence rule (UCC § 2-202) does not apply to evidence of subsequent agreements or modifications. . . ."); Muther-Ballenger v. Griffin Elec. Consul., 397 S.E.2d 247, 250 (N.C.Ct.App.1990) (rejecting argument that the parol evidence rule under the North Carolina Commercial Code would bar plaintiff's evidence of oral modifications made subsequent to the written contract). Here, the oral modification occurred on August 26, a date subsequent to August 21, the effective date of the contract. Accordingly, the GCC parol evidence rule did not apply to bar Flowers Ginning's evidence that the parties agreed to orally modify the delivery and installation date from November 19, 1991 to October 1, 1991.

IV.

ARMA's last argument is that the magistrate judge erroneously concluded that Flowers Ginning presented sufficient evidence to support the damage award, beyond more than nominal damages, on the breach of contract claim. This argument has no merit.

Pursuant to Georgia law:

> [T]he measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which fulfillment of the contract would have prevented or the breach of it entailed. In other words, the person injured

> . . . is to be placed in the position he would have been in had the contract been performed.

Bennett v. Associated Food Stores, Inc., 165 S.E.2d 581, 585 (Ga.Ct.App.1968); see also PMS Constr. Co., Inc. v. DeKalb County, 257 S.E.2d 285 (Ga.1979). When items of claimed damages cannot be traced solely to the breaching party's breach, such items cannot be recovered. See Department of Transp. v. Arapaho Constr. Co., 349 S.E.2d 196 (Ga.Ct.App.1986), aff'd, 357 S.E.2d 593 (Ga.1987). Accordingly, at trial, Flowers Ginning bore the burden of furnishing sufficient evidence from which the jury could determine its damages with reasonable certainty. See Hospital Auth. v. Bryant, 277 S.E.2d 322 (Ga.Ct.App.1981).

The record reflects that Flowers Ginning bore its burden of furnishing sufficient evidence from which the jury could determine with reasonable certainty that ARMA's breach of the contract caused Flowers Ginning to sustain total damages of $330,555 in both completion costs and lost profits. Linwood Wooten, Flowers Ginning's certified public accountant, testified as to the costs incurred by Flowers Ginning in order to get the UD press and related equipment installed and operational. (J.A. 545-46). Wooten also testified about lost profits for the 1991 ginning season and for a period thereafter. (J.A. 544, 570-74, 939). The jury, having credited this testimony, leaves us in no position to disturb the jury's award of damages.

Appendix A

V.

For the reasons stated herein, we affirm the judgment entered by the court below.

AFFIRMED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent because I believe the parol evidence rule bars evidence of the parol agreement to change the date set in the written contract.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 30, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-5137, 95-5338

BMC INDUSTRIES, INC.,

Plaintiff-Appellee,

versus

BARTH INDUSTIES, INC.,NESCO, INC.,
f.k.a. Nesco Management, Inc., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix B

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

(3)

No. 98-1579

FILED

MAY 14 1999

CLERK

IN THE

Supreme Court of the United States

BMC INDUSTRIES, INC.,

Petitioner,

v.

BARTH INDUSTRIES, INC., Nesco, Inc., f/k/a Nesco Management, Inc., Barth Industries Co. Limited Partnership, BIC Corporation, Nesco Holdings, Inc., f/k/a Nesco, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

The focus of BMC's contention is the Eleventh Circuit's refusal to certify an unsettled question of Florida law, and that court's failure to do so has created intercircuit conflict on a significant UCC issue. Federal courts of appeals are somewhat circumscribed by the decisions of one another and therefore recognize that creating conflict among the circuits is undesirable. Specifically addressing this point in *Resolution Trust Corp. v. Chapman*, 29 F.3d 1120 (7th Cir. 1994), Judge Easterbrook observed:

> Even if we doubted the correctness of these holdings, which we do not, we would not think it prudent to create a conflict among the circuits.

Id. at 1222. To be sure, the Florida Supreme Court could eventually decide the UCC issue in favor of Barth. But that is not the point. Simply put, the Eleventh Circuit should not have been the court to create the conflict. Rather than yielding to the preferred course of certification, the Eleventh Circuit chose to preempt a cooperative federal and state judicial process adopted by Florida under its constitution, its statutes and its appellate rules. (Petition at 3-6) To say the least, certification is an important component of Florida and federal jurisprudence as this Court expressly recognized in *Lehman Bros. v. Schein*, 416 U.S. 386 (1977) and as recognized by the Florida Supreme Court in *Sun Insurance Office, Ltd. v. Clay*, 133 So.2d 735, 742 (Fla. 1961).

In *Sun Insurance*, the court explained that Florida constitutional and general law provide for the adoption of practice and procedural rules for the certification to the

Florida Supreme Court by federal appellate courts of "questions of state law determinative of a cause pending in federal court." *Id.* at 741. Referring specifically to the certification procedural rule, the court said:

> Its adoption was a valid exercise of our organic power and provided a procedure for assisting, *in a spirit of comity*, the Federal Appellate system in questions of state jurisprudence, no other forum for so doing having been established by the laws of Florida.
>
> * * *
>
> *It is now well established procedure for a federal court to abstain from deciding the merits of a case so as to afford the state courts a reasonable opportunity to construe a state statute involved in the case.* As stated in *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 79 S. Ct. 1025, 1030, 3 L. Ed. 2d 1152.
>
> > *This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system.* To minimize the possibility of such interference a "scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," *Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S.

> Ct. 217, 219, 76 L. Ed. 447, as their "contribution . . . in furthering the harmonious relation between state and federal authority . . ." *Railroad Comm. Of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S. Ct. 643, 645, 85 L. Ed. 971.
>
> *And statutes such as § 25.031 — enacted by the Florida Legislature "with rare foresight," [363 U.S. 207, 80 S. Ct. 1222, 1226] to borrow Mr. Justice Frankfurter's words describing its action in this respect — cannot help but contribute substantially to the salutary policy quoted above,* since such statutes would provide a vastly more expeditious method of securing an authoritative decision by the court of last resort of a state of a doubtful question of state law than does the declaratory judgment procedure, the route frequently followed in such cases. *See Harrison v. N.A.A.C.P., supra*; *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163; *cf. Meredith v. City of Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9.

Sun Insurance, 133 So.2d at 741-42 (emphasis added).

Commenting on less desirable practices followed *prior* to the availability of certification — where federal courts either would determine first impression questions on their own or abstain altogether — the Florida Supreme Court in *Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (Fla. 1978), characterized the certification process as one initiated *expressly to permit doubtful questions of state law to be "referred directly to the highest state court for resolution."*

Id. at 376 (emphasis added). Relying specifically on *Lehman Bros.*, the court added that "[a]s a tool of federal-state comity, the certification process has been well-received, and is now used generously in the federal system where permitted by state law." *Id.*

Whether described as "cooperative judicial federalism" or "federal-state comity", the concept of certification reflects a policy judgment similar to Justice O'Connor's statement of policy regarding *stare decisis* in *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997). "[I]n most matters it is more important that the applicable rule of law be settled than that it be right." *Id.*, 118 S. Ct. at 284. Thus, while this case presents a conflict between the Eleventh Circuit (per Judge Gerald Tjoflat) and the Seventh Circuit (per Chief Judge Richard Posner), BMC is not now asking for resolution of that conflict. Rather, it is urging this Court to order compliance with the policy underpinning of *Lehman Bros.* This Court deemed certification important enough to grant certiorari and render an opinion in *Lehman Bros.* calling for a *connection* between federal and state judiciaries even though they are sufficiently independent. Unfortunately, the Eleventh Circuit chose to go down its own path.

To justify the result below, Barth focuses on the Eleventh Circuit's reliance upon an intermediate Florida appellate court decision, *Linear Corp. v. Standard Hardware Co.*, 423 So.2d 966 (Fla. 1st DCA 1982), and contends that the Eleventh Circuit did not need to certify the question at issue because *Linear* "implicitly" decided the UCC question in favor of Barth. This statement is simply not true. An examination of the facts and holding of *Linear* discloses that the decision does not even address — much

less determine — the dispositive point. If anything, *Linear* can readily be interpreted to support BMC, consistent with *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986). The plain truth, however, is that either interpretation is a stretch because the case does not utter a word about reliance, as analyzed by Judge Posner. Procedures were in place to avoid the very problem which has now been created by the court's ruling. A jury verdict was overturned in the process and ten years worth of litigation will now start over from scratch.

In *Leavitt v. Jane L.*, 518 U.S. 137 (1996), this Court stated in no uncertain terms that it will not turn a "blind eye" to state law determinations which are far reaching in their impact, controversial, or perhaps even "plainly wrong." *Id.* at 144-45. In this case an interstate commercial transaction was structured between major corporations located in different states (Minnesota and Ohio) and different circuits (the Sixth and the Eighth). They contracted to do business in yet another state (Florida) situated in another federal circuit (the Eleventh), which is now at odds with two other circuits (the Fourth and Seventh) on a major issue of *uniform* law. Forty-nine states have adopted the UCC to simplify, clarify, and modernize the law governing commercial transactions, *and to make uniform the law among the various jurisdictions whose citizens do business with one another.* Uniform Commercial Code, § 1-102(2). Certification procedures exist to foster that purpose. That is precisely why the UCC issue should have been certified in this case.

CONCLUSION

Given Florida's proliferation as a center of global commerce, it should have been virtually *pro forma* for the Eleventh Circuit to permit Florida the opportunity to determine the UCC issue for itself. A more compelling case for certification in a civil context is hard to imagine. Fortunately it is not too late to correct the problem. It is still possible to send the issue to Florida. This Court is urged to order certification.

Respectfully submitted,

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